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# Constitutionalism and the Foundations of the Security State

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# Constitutionalism and the Foundations of the Security State

Aziz Rana\*

*Scholars often argue that the culture of American constitutionalism provides an important constraint on aggressive national security practices. This Article challenges the conventional account by highlighting instead how modern constitutional reverence emerged in tandem with the national security state, critically functioning to reinforce and legitimize government power rather than primarily to place limits on it. This unacknowledged security origin of today's constitutional climate speaks to a profound ambiguity in the type of public culture ultimately promoted by the Constitution. Scholars are clearly right to note that constitutional loyalty has created political space for arguments more respectful of civil rights and civil liberties, making the very worst excesses of the past less likely. At the same time, however, public discussion about protecting the Constitution—and a distinctively American way of life—has also served as a key justification for strengthening the government's security infrastructure over the long run.*

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*I argue that in the late nineteenth and early twentieth centuries, there existed significant popular skepticism of the basic legitimacy of the Constitution. Against the backdrop of World War I and the Russian Revolution, a combination of corporate, legal, and military elites initiated a concerted campaign to establish constitutional support as the paramount prerequisite of loyal citizenship. Crucially, such elites viewed the entrenchment of constitutional commitment as a fundamental national security imperative. They called for a dramatic and permanent extension of the reach of the federal government's coercive apparatus. In this process, defenders of the Constitution endorsed many of the practices we most associate with extremism and wartime xenophobia: ideological uniformity, appeals to American exceptionalism and cultural particularity, militarism, and political repression. The World War I origins of today's constitutional climate do not simply reveal a troubling but distant past. Rather, the foundations developed nearly a century ago continue to intertwine constitutional loyalty with the prerogatives of the national security state in ways that often go unnoticed, making it difficult to separate the liberal and illiberal dimensions of American constitutional culture.*

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INTRODUCTION: CONSTITUTIONAL ATTACHMENT AND AMERICAN  
CIVIC CULTURE

In contemporary American politics, perhaps no commitment enjoys as much widespread public support as belief in the sanctity of the federal Constitution. Displays of constitutional loyalty are ubiquitous, ranging from the establishment of Constitution Day as a national holiday<sup>1</sup> to bipartisan readings from the text to usher in new sessions of Congress<sup>2</sup> to references to its wisdom during presidential speeches and addresses.<sup>3</sup> There are of course dissenting views, especially following the recent financial crisis and government gridlock. A vocal minority of scholars declares that the Constitution has generated a “frozen republic”<sup>4</sup> or a “republic, lost”<sup>5</sup> and argues for “constitutional disobedience”<sup>6</sup> and even a new constitutional convention.<sup>7</sup> But as a political

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1. This occurred in 2004 against the backdrop of the Iraq War. Democratic Senator Robert Byrd from West Virginia spearheaded the effort and pushed through an amendment to an appropriations bill that made September 17, the date of the text’s 1787 Convention signing in Philadelphia, a special day of commemoration. See Jason Frank, Constitution Day Lecture at Cornell Law School (Sept. 17, 2012) (transcript on file with author). The bill mandated that every educational institution receiving federal funds, regardless of whether the institution was private or public, grade school or university level, “shall hold an educational program on the United States Constitution on September 17.” Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 111(b), 118 Stat. 2809, 3344 (codified at 36 U.S.C. § 106 (2006)). Although Byrd was a sharp Administration critic and opponent of the war, the Bush White House strongly backed the holiday. In fact, for years, Bush had been issuing executive proclamations declaring the week of September 17 to be “Constitution Week.” See Proclamations Issued by President Bush, THE WHITE HOUSE: PRESIDENT GEORGE W. BUSH, <http://georgewbush-whitehouse.archives.gov/news/proclamations/> (last visited Jan. 8, 2015). For more on political circumstance around the 2005 bill, see Frank, *supra*.

2. This practice was started in 2011 by Republican members of the House of Representatives, with notable Democrats such as Nancy Pelosi participating. Mary McGuire, *66 Minutes to Read the U.S. Constitution*, ABC NEWS (Jan. 15, 2013, 1:17 PM), <http://abcnews.go.com/blogs/politics/2013/01/66-minutes-to-read-the-constitution>. Two years later, according to Bob Goodlatte, the Republican House Judiciary Chair, the desire to participate in the reading was so strong that they “ran out of Constitution before they ran out of readers.” *Id.*

3. As just one illustration, the very first words of President Barack Obama’s second inaugural address maintained that the inauguration itself should be viewed as a collective moment in which the country “bear[s] witness to the enduring strength of our Constitution.” Barack Obama, President of the U.S., Second Inaugural Address (Jan. 21, 2013) (transcript available at [http://articles.washingtonpost.com/2013-01-21/politics/36473487\\_1\\_president-obama-vice-president-biden-free-market](http://articles.washingtonpost.com/2013-01-21/politics/36473487_1_president-obama-vice-president-biden-free-market)).

4. DANIEL LAZARE, *THE FROZEN REPUBLIC: HOW THE CONSTITUTION IS PARALYZING DEMOCRACY* (1996).

5. LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011).

6. LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* 10 (2012) (arguing that for Americans to fulfill our national principles we must actually “first free ourselves from the yoke of constitutional obligation”).

7. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006). In republishing his seminal book *Constitutional Faith* in 2011, Levinson pointedly concluded in a new afterword that although he once chose to sign the Constitution as part of an exhibit celebrating the text’s 200th anniversary he would not do so again. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 246, 249–50 (2d ed. 2011). He no longer believed in the document’s progressive potential, “unless one reduce[d] ‘constitutional faith’ to a willingness to embrace the Preamble while being harshly critical of much of what follows it.” *Id.* at 245.

matter, these calls to ignore or fundamentally rewrite the Constitution are voices in the wilderness; they reside more or less exclusively in the academy and would be nearly unthinkable if expressed by a major electoral figure in public life.

Furthermore, even in the academy, constitutional loyalty runs deep, with legal scholars habitually reaffirming their own commitment to the text and arguing that the Constitution and American nationhood are inextricably bound together. In the words of Akhil Amar, the Constitution is “one of the things . . . that we Americans have in common, one of the things that *constitute* us as Americans.”<sup>8</sup> Laurence Tribe takes such sentiment further, contending that the very idea of being “American” only makes sense against the backdrop of the document. Tribe writes that the 1787 Constitution’s “text and invisible structure are part of the nation’s beating heart—the solar plexus at which the vast diversity of American narratives inevitably converge, and the conversation through which we remain tied to past and future generations. ‘We, the People’ cannot simply bracket our Constitution . . . for that very notion presupposes a ‘we’ that exists outside the Constitution’s frame.”<sup>9</sup>

Such commentary is in large part driven by the belief that the Constitution as a cultural force has had profound positive effects on American civic life. For Tribe, what makes the text so invaluable is not so much its specific structural features, let alone the legal opinions that judges have reached. Rather, the Constitution and the discursive traditions that surround it provide Americans with a continuous practice of “collective interpretation and reinterpretation,”<sup>10</sup> one that promotes not only substantive liberal commitments but also a broader national ethic of critical engagement.

Tribe, Amar, and others are well aware that citizens once viewed the Constitution itself as compatible with various modes of illiberalism and coercion. But according to these authors, the constitutional tradition has, above all, played the role of forcing Americans to confront their own national demons. As Jack Balkin and Reva Siegel maintain, the Constitution provides a reflective mechanism for addressing the country’s historic sins and for reshaping American identity on grounds of universal equality and fundamental rights. They write, “All these changes came about because people believed in their Constitution and in the importance of continually examining our practices in light of our principles.”<sup>11</sup> For this reason, “each generation must honor the

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8. Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 *FORDHAM L. REV.* 1657, 1658 (1997) (continuing, “[a]nd I think it is, perhaps, a superior form of constituting us as Americans than the fact that we all watch *Seinfeld* and *Friends* on Thursday night”).

9. Laurence H. Tribe, *America’s Constitutional Narrative*, 141 *DAEDALUS*, Winter 2012, at 18, 34.

10. *Id.* at 19.

11. Jack M. Balkin & Reva B. Siegel, *Introduction*, in *THE CONSTITUTION IN 2020* 1, 3 (Jack M. Balkin & Reva B. Siegel eds., 2009).

Constitution's commitments in its own time."<sup>12</sup> Underlining the point, Cass Sunstein similarly concludes that failing to do so would mean nothing less than abandoning precisely what is exceptional in American character: a constitutional culture that has over time promoted democratic consent, pluralism, and equal rights for all.<sup>13</sup>

Such arguments about the salutary effects of constitutional attachment are particularly pronounced in debates about national security. Today, scholars and commentators routinely contend that the Constitution functions as a constraint on an aggressive security mindset, especially by checking government excess and discretionary authority. Once again, scholars readily admit that such constraint does not always (or even primarily) occur through explicit court oversight, given the checkered judicial history when it comes to rights protection. But even when more formal constitutional processes fail as safeguards, the Constitution, so the story goes, provides a second, far more important type of constraint. It promotes a common public culture committed to self-reflection, respectful of the rule of law, and skeptical of belligerent and xenophobic appeals to exclusion and violence. Geoffrey Stone writes that "the United States has made substantial progress" in the last century in balancing security with liberal values, in large part because of "the development of a national culture" grounded in constitutional attachment and "more attuned to civil liberties."<sup>14</sup> Richard Pildes also sees a narrative of real progress, because of how the pervasive climate of constitutional loyalty affects presidential decision making.<sup>15</sup> According to him, the Constitution above all "serve[s] as a crucial focal point for widely shared judgments about presidential credibility."<sup>16</sup> Thus, even in circumstances where there is little likelihood of an official reprimand, the public belief that the President has violated the Constitution imposes extensive political sanctions.<sup>17</sup> In effect, for scholars like Stone and Pildes, widespread constitutional commitment operates to place serious limitations on the government's coercive apparatus.

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12. *Id.*

13. See Cass R. Sunstein, *The Real Meaning of American Exceptionalism*, BLOOMBERG VIEW (Sept. 23, 2013, 9:00 AM), <http://www.bloomberg.com/news/2013-09-23/the-real-meaning-of-american-exceptionalism.html>. According to Sunstein, "American exceptionalism is real. It began in 1787, with the Constitution's effort to establish a large, self-governing republic, in which diverse views serve as both a safeguard and a creative force." *Id.* Quoting Alexander Hamilton's language in *Federalist No. 1*, Sunstein declares that while European history, marked by monarchical despotism and class conflict, may have been the product of "accident and force," the defining feature of the American experiment—expressed most profoundly by that initial act of constitutional construction—is instead the effort to base politics on "reflection and choice." *Id.*

14. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 533 (2004).

15. Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381 (2012).

16. *Id.* at 1411.

17. See *id.* at 1412 (arguing that citizens and political actors "will coalesce in broad agreement around the point that public officials should comply with the law. Because the law has this focal-point significance, the allegation that the President has violated the law is often what *transforms* an event into a scandal").

This Article challenges the conventional narrative that constitutional loyalty has unproblematically refashioned American civic life around liberal values, in the process generating a more inclusive and less coercive political community. It does so by offering an alternative account of the historical relationship between constitutional attachment and national security practices. I argue that in the late nineteenth and early twentieth centuries, significant popular skepticism actually existed concerning the basic legitimacy of the text, voiced at times even by future presidents and sitting judges.<sup>18</sup> But against the backdrop of World War I and the Russian Revolution, a combination of corporate, legal, and military elites initiated a concerted campaign to establish constitutional support as the paramount prerequisite of loyal citizenship. At a moment of external conflict and real domestic uncertainty about what defined the United States as a unified community, these civic and political actors sought to elevate the Constitution above popular dissent. Crucially, such elites viewed the entrenchment of constitutional support as fundamentally a national security imperative; they called for dramatically and permanently extending the reach of the federal government's security apparatus. In the process, defenders of the Constitution reproduced many of the practices we most associate with extremism and wartime xenophobia: ideological uniformity, appeals to exceptionalism and cultural particularity, militarism, and political repression.

The unacknowledged *national security* origins of today's constitutional reverence highlight a profound ambiguity in the type of public culture that the Constitution has promoted. In particular, the text and the discursive traditions it has spawned fuse liberal and illiberal practices in ways that are difficult to disentangle. Stone, Pildes, Tribe, and others are clearly right to note that constitutional loyalty has created political space for creedal arguments more respectful of civil rights and civil liberties, making the very worst excesses of the past less likely to manifest today. At the same time, however, public language about protecting the Constitution—and with it a distinctively American way of life—has also served as a key justification for strengthening the government's security infrastructure over the long run. Moreover, the twentieth-century historical process by which elites generated an affective popular bond to the American Constitution was based just as much on inculcating deference from above as on fostering self-reflective citizen-subjects—what scholars often associate with constitutional culture. In effect, the events surrounding World War I underscore how modern constitutional reverence emerged in tandem with the national security state, functioning critically to reinforce and legitimize government power instead of simply to limit it.<sup>19</sup> The long-term implication is that our constitutional culture—rather

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18. See *infra* Part I.

19. In highlighting these far-less-explored features of constitutional reverence, this Article resonates with a set of intuitions also present in two recent monographs: Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1086 (2014)

than merely liberal or illiberal—is marked instead by mutually constitutive bonds of rights promotion and rights infringement, dissent and repression.

Part II begins by detailing how today's mass politics of constitutional veneration actually mark a break from the public culture of the late nineteenth and early twentieth centuries. In the wake of the Civil War and against the backdrop of industrial conflict, the country was consumed by profound social discord, including over the continuing political relevance of the Constitution. In Part III, I turn to a close examination of how the collective attitude toward the Constitution began to shift, especially with growing concerns about the internal and external threats facing the country. Drawing from original archival work, I demonstrate how a collection of pro-war organizations, operating in concert with public officials and corporate elites, rallied around the Constitution as the positive principle justifying American militarism abroad and a robust new security framework at home. Part IV then explores the basic policies civic and government actors pursued to promote both constitutional loyalty and the emerging security state; these policies centered on patriotic education, cultural assimilation, and the suppression of anti-constitutional sentiment. This pro-Constitution campaign had the practical effect of fundamentally reshaping the public debate about the text's legitimacy. Although constitutional skepticism persisted on the labor left and among middle-class reformers throughout the interwar period, constitutional defenders nonetheless succeeded in permanently linking constitutional support with patriotism in the mainstream public imagination.

In conclusion, I suggest two long-term legacies of the historic interconnection between modern constitutional reverence and the rise of the national security state. First, I argue that while today's constitutional advocates would certainly reject the regressive brand of politics that earlier defenders pursued, it may not be so easy to disassociate the current—presumably liberal—constitutional climate from its genesis a century ago. This is because constitutional debate today takes place against a backdrop of far greater ideological agreement (especially over basic questions of governmental structure) than that which existed in 1900. And indeed, the very space for today's climate of self-reflection and critique was in part made possible by past practices of imposed deference and ideological repression, practices which essentially now go unnoticed and unacknowledged. Second, I also delineate how exceptionalist discourses around American constitutionalism have persisted well past World War I in validating national security prerogatives. The same early twentieth century arguments that linked the Constitution to a

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(arguing that even the embrace of civil libertarianism in the wake of World War I by some Progressive lawyers should be read as an effort to “strengthen rather than to circumscribe the administrative state”); and Jared A. Goldstein, *The American Liberty League and the Rise of Constitutional Nationalism*, 86 TEMP. L. REV. 287 (2014) (describing far right political uses of the Constitution and their destructive effects).



special national destiny were again at the heart of Cold War and post-9/11 justifications for an aggressive security posture at home and abroad. All this speaks to the equivocal nature of our modern constitutional culture and thus the deep links between discourses of rights respect on the one hand and those of coercion on the other.

## I.

### TURN OF THE CENTURY AMERICA AND CONSTITUTIONAL DISILLUSIONMENT

At first glance, it might be surprising to think of constitutional reverence, which appears inevitable in today's public life, as ever being politically suspect. In the words of Laurence Tribe, loyalty to the text can seem for Americans like "the night sky,"<sup>20</sup> a timeless feature of our collective past and the closest political fact we have to a natural one. Indeed, during many periods of American history, most organized constituencies—whatever their disagreements about the Constitution's concrete meaning—have nonetheless taken the document as a given fact of political reality and even celebrated it.<sup>21</sup> But in the late nineteenth century, the experience of the Civil War and growing industrial strife cast a pall over the Constitution. Large swathes of the public worried whether the existing order was adequate to maintain social peace or to address new economic grievances. While most Americans refrained from embracing actual constitutional rupture and overthrow, the general tenor of public discourse was one of profound disappointment rather than fealty and veneration. In this Section, I provide a brief overview of the constitutional environment in the late nineteenth and early twentieth centuries—a time when the country witnessed judges, popular politicians, and even future presidents explicitly defending systematic textual revisions. Such facts highlight the depth of public skepticism vis-à-vis the Constitution as well as the significant challenges pro-Constitution activists faced in shifting the cultural climate toward greater support.

#### A. *The Civil War, Sectionalism, and Constitutional Disappointment*

The Civil War, with its reverberating legacy of bitterness and white supremacist violence, was one of the key reasons that the Constitution lost much of its previous luster. If anything, the war raised basic questions about the Constitution's legitimacy. How could the text be thought of as a successful

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20. Tribe, *supra* note 9, at 19.

21. For more on majority acceptance of constitutional legitimacy, especially during the early republic, see Lance Banning, *Republican Ideology and the Triumph of the Constitution, 1789 to 1793*, 31 WM. & MARY Q. 167, 168 (1974) (describing the willingness of most anti-Federalist voices to accept the inevitability of the legal and political system as a "quick apotheosis of the American Constitution" and "a phenomenon without parallel in the western world"); see also MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 29 (1986) (referring to the "basic pattern of American constitutionalism as one of *conflict within consensus*").

institutional experiment—let alone a mechanism that promoted national unity—if it had failed to head off such a cataclysmic social conflict? These questions circulated across sectional lines and punctured efforts to foster a culture of reverence around the document.

Indeed, when politicians and civic leaders established the privately run Constitutional Centennial Commission to celebrate the text's one hundredth anniversary, they failed to generate much public enthusiasm. The Commission's efforts to produce countrywide events honoring the document foundered on what one key organizer called, "the entire absence of any interest or general sentiment in favor of the proposed celebration on the part of the public at large."<sup>22</sup> The organization could not convince Congress to provide funding or support, had limited success in attracting an official poet or orator, and received polite declines from many of those asked to attend the central celebration at Philadelphia's Independence Square.<sup>23</sup>

Explaining the collective mood of disinterest, E.L. Godkin, the founder of *The Nation*, wrote in the magazine that the recent war made it difficult to take seriously the worshipful tone of anniversary celebrations. He commented that for the "original [F]ramers" the text's principal goal had been to address "two great difficulties": "the union of slave and free States under a common government, and the merging of State allegiance [and] national allegiance in the mind of the citizens of the several States."<sup>24</sup> When measured against these central purposes, the Constitution could only be viewed as a "failure"<sup>25</sup>—a fact that was not lost on the public.

The sense of constitutional disillusionment that the war provoked was particularly pronounced among specific political constituencies during and after Reconstruction. For many white Radical Republicans in the North, constitutional structures—such as the Supreme Court, the Electoral College, and the state-based representational system in the Senate—facilitated Southern intransigence and violence in the face of Reconstruction. This was because these institutions—the products of an antebellum accommodation with slavery and states' rights—overrepresented ex-Confederate voices in government and thus often gave an effective veto to the Union's very enemies when it came to much-needed racial reforms. Such critics of the Constitution had long been steeped in an Abolitionist reform movement, in which prominent figures like William Lloyd Garrison and Wendell Phillips denounced the text as an

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22. See KAMMEN, *supra* note 21, at 128. See generally *id.* at 127–55 (explaining the many challenges facing the centennial celebration).

23. *Id.* at 136–37. In fact, no poet could be convinced, and Associate Justice Samuel Miller served as orator only after numerous other figures turned down the request. For an excellent account of the challenges facing the centennial celebration, see *id.* at 127–55.

24. E.L. Godkin, *Some Things Overlooked at the Centennial*, NATION, Sept. 22, 1887, at 226; see also KAMMEN, *supra* note 21, at 141.

25. Godkin, *supra* note 24, at 226.

“agreement with hell”<sup>26</sup> and a “pro-slavery compact.”<sup>27</sup> In the postwar period, confronted first by a resistant Southern president in Andrew Johnson and later by a Supreme Court willing to roll back the most transformative racial accomplishments of the era, Pennsylvania Congressman Thaddeus Stevens and others considered the constitutional order—with its intricate system of checks and balances—to be little more than a sustained infrastructure for protecting white supremacy. As Stevens reportedly told one interlocutor, in his view, the document was “a worthless bit of old parchment.”<sup>28</sup>

As for many white supremacists in the former Confederacy, despite the utility of federalist structures in constraining Reconstruction, the Constitution nonetheless symbolized their own defeat. In the South, white bitterness over the war fed a politics of such intense hostility among sectionalists—those whose primary political allegiance remained to the Confederacy—that any national symbol, even the Declaration of Independence, became suspect. Before the Civil War, African Americans often celebrated Independence Day on July 5 as an explicit commentary on black enslavement and exclusion from the body politic.<sup>29</sup> But after the war, July 4 became a day of massive black parades and festivities. At the same time, Southern whites now retreated indoors in silent protest. In the words of one South Carolina diarist, July 4 was a day that African Americans commemorated while “whites stay[ed] at home and work[ed].”<sup>30</sup> With even the Declaration a fraught symbol, many die-hard

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26. William Lloyd Garrison introduced a resolution before the Massachusetts Anti-Slavery Society in 1843, stating that “the compact which exists between the North and South is ‘a covenant with death, and an agreement with hell,’—involving both parties in atrocious criminality; and should be immediately annulled.” JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 253 n.7 (2011) (quoting WALTER M. MERRILL, *AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON* 205 (1963)).

27. WENDELL PHILLIPS, *THE CONSTITUTION, A PRO-SLAVERY COMPACT* (New York, American Anti-Slavery Society, 3d ed. 1856).

28. RICHARD TAYLOR, *DESTRUCTION AND RECONSTRUCTION: PERSONAL EXPERIENCES OF THE LATE WAR* 299 (Richard B. Harwell ed., Longmans, Green & Co. 1955) (1879). This quote comes from a meeting between Thaddeus Stevens and Richard Taylor, a Confederate General during the war and son of President Zachary Taylor. Thus, one may well wonder whether Taylor, who saw Stevens as a bitter enemy, sought to smear Stevens by accusing him of lawlessness. Still, whether the quote is exact, it was certainly the case that Stevens, like many other Radical Republicans, considered the 1787 constitutional structure to be a significant obstacle to the project of racial transformation.

29. For example, Frederick Douglass’s famous 1852 address to the Antislavery Society of Rochester, “What to the Slave Is the Fourth of July?” was delivered on July 5 because according to historian Mason Lowance, Douglass “did not wish to participate in the celebration of hypocrisy and could not join the festivities recalling the Declaration of Independence.” Mason Lowance, *Frederick Douglass (1818–1895)*, in *AGAINST SLAVERY: AN ABOLITIONIST READER* 38, 38 (Mason Lowance ed., 2000). Also highlighting black anger at white American hypocrisy, Nat Turner planned his slave revolt to begin on July 4, 1831. MATTHEW DENNIS, *RED, WHITE, AND BLUE LETTER DAYS: AN AMERICAN CALENDAR* 287 n.18 (2002).

30. ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877*, at 289 (1988).

sectionalists associated the Constitution with perceived federal oppression and Northern control.<sup>31</sup>

Constitutional skepticism persisted even among Southern racial conservatives, who accepted the need for reconciliation and thus defended national over sectional attachment. Future President Woodrow Wilson, the son of a Virginia slave owner and a rising Atlanta lawyer in the 1880s, embodied this “New Southern” desire for meaningful integration with the North.<sup>32</sup> Wilson’s central concern was that the South had become an economic backwater. As a consequence, he believed that the region should be remapped in modern industrial terms so that it shared the wealth of commercial growth and served as more than simply a supplier of raw materials to the North. But he worried that unless the Federal Constitution was dramatically reinterpreted by the courts, structurally altered by amendment, or even rewritten through a new convention, it would be incapable of facilitating the national policies that could place the South on an equal footing with the North. As Wilson wrote in 1885, whatever the wisdom of the initial design, it was increasingly unclear whether the text remained “adapted to serve the purposes for which it was intended.”<sup>33</sup> Influenced by Walter Bagehot’s 1867 work *The English Constitution*, he called for a parliamentary system with a strong prime minister.<sup>34</sup> For Wilson, national cohesion actually *required* fundamental structural reform of the Constitution.

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31. Although writing in the 1930s, Frank Lawrence Owsley, influential co-author of the “Southern Agrarian” manifesto *I’ll Take My Stand*, captured sectionalist views that had long circulated in the postwar South. Owsley contended that wealthy Northerners wrote the Constitution in a way that fostered Northern economic expansionism, which, in turn, thrust the South into the Civil War. See Frank L. Owsley, *The Irrepressible Conflict*, in *I’LL TAKE MY STAND: THE SOUTH AND THE AGRARIAN TRADITION* 61, 61–91 (1930). He argued that the country was “less a nation than an empire made up of a congeries of regions marked off by geographic, climatic, and racial characteristics.” FRANK L. OWSLEY, *The Pillars of Agrarianism*, in *THE SOUTH: OLD AND NEW FRONTIERS* 177, 186 (Harriett Chappell Owsley ed., 1969). Given the reality of Confederate defeat and the fact that separation was no longer a possibility, some sectionalists like Owsley saw abandoning the Constitution—a document supposedly used to maintain domination over the South—as one potential solution. Owsley called for a new mode of government that ensured de facto autonomy to the various regions of the country with only minimal federal intervention. See *id.* at 187 (“The federal government should have supreme control over war and peace, the army and navy, interregional or even interstate commerce, banking, currency, and foreign affairs. On the other hand, the sections should have equal representation in the federal legislative body and in the election of the president and the cabinet. The legislative body should be composed of a senate only and should be elected by the regional congresses. Finally, . . . the several regions should have an equal share in making the tariff, which would be in the form of a treaty or agreement between all the sections, somewhat in the fashion of the late Austro-Hungarian tariff treaties.”).

32. Historian Michael Dennis describes Wilson as personifying the emerging white middle-class sensibilities in the urban South, especially the commitment to “regional progress through national reconciliation, industrial growth, agricultural diversification, and racial control.” Michael Dennis, *Looking Backward: Woodrow Wilson, the New South, and the Question of Race*, *AM. NINETEENTH CENTURY HIST.*, Spring 2002, at 77, 77.

33. WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* 1–5 (Boston, Houghton, Mifflin & Co. 1885).

34. See generally *id.* at 58–129.

As with Southern sectionalists, Wilson was angered at how Northern elites had supposedly manipulated the text to serve Northern ends—problems that “the rude shock of the war”<sup>35</sup> and Reconstruction made plain to him. Wilson maintained a strong commitment to black subordination, defending slavery as a wrongly maligned and benevolent, albeit paternalistic, institution. He claimed that the text had been “organized upon the initiative and primarily in the interest of the mercantile . . . classes”<sup>36</sup> in the North. After the war, the text promoted a destructive project of racial readjustment, in which Republicans imposed black voting and legal protections on Southern whites, the region’s “real citizens.”<sup>37</sup> In overseeing both Reconstruction and the “the sudden and absolute emancipation”<sup>38</sup> of slaves, the Constitution, according to Wilson, had been complicit in “a dark chapter of history.”<sup>39</sup>

In the end, however, perhaps the voice of constitutional disappointment that most powerfully captured the postwar age came from African Americans, the very community that men like Wilson thought the Constitution unduly advantaged. With the passage of the Reconstruction Amendments, large numbers of African Americans began to embrace the Constitution and the Declaration of Independence as symbols of their own freedom and equality. But the steady move of the black community from bondage to liberty and back again to bondage left many of its members increasingly embittered by the hypocrisy of white America and the hollowness of constitutional protections. In the wake of the Supreme Court’s 1883 decision in the *Civil Rights Cases*,<sup>40</sup> which struck down provisions of the 1875 Civil Rights Act, a wave of anger swept through both urban and rural black constituencies. In response to such outrage, Howard University professor B.K. Sampson called on African Americans to remain “loyal still”<sup>41</sup> to the country and to maintain faith in the Constitution’s ideals, especially the egalitarian promise of the Reconstruction Amendments. He declared that the white “public mind is softening as it ripens”

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35. *Id.* at 5.

36. WOODROW WILSON, *DIVISION AND REUNION: 1829–1889*, at 12 (New York, Longmans, Green, & Co. 1893).

37. Dennis, *supra* note 32, at 82 (quoting Woodrow Wilson, *The Reconstruction of the Southern States*, 87 ATLANTIC MONTHLY 1, 11 (1901)).

38. Woodrow Wilson, *The Reconstruction of the Southern States*, 87 ATLANTIC MONTHLY 1, 6 (1901).

39. *Id.* at 11. Wilson decried Reconstruction practices, complete with the new constitutional amendments, for producing a vast “‘laboring, landless, homeless class,’ once slaves, now free; unpracticed in liberty, unschooled in self-control; never sobered by the discipline of self-support, never established in any habit of prudence; excited by a freedom they did not understand, exalted by false hopes; bewildered and without leaders, and yet insolent and aggressive, sick of work, covetous of pleasure,—a host of dusky children untimely put out of school.” *Id.* at 6.

40. 109 U.S. 3 (1883).

41. See DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* 311 (2002).

and so the decision, whatever its consequences in the present, should not be read as “a finality.”<sup>42</sup>

But for other black leaders, such counsel was nothing more than an exercise in self-delusion. According to African Methodist Episcopal (AME) Reverend Henry McNeal Turner, the decision above all highlighted the fundamental incompatibility between black interests and those of the broader white community. Ex-slaves and their former masters remained irreconcilably opposed, and so long as the polity preserved the economic and political power of the latter, through decisions such as the *Civil Rights Cases*, blacks owed no allegiance to the republic. In Turner’s words, “If the government that freed him cannot protect his freedom, then . . . he does not stand face to face with its laws and institutions, and the negro hereafter who will enlist in the armies of the government, or swear to defend the United States Constitution ought to be hung by the neck.”<sup>43</sup> For Turner, black emigration abroad was the only viable response in a context where “[t]he negro is literally driven out of the United States.”<sup>44</sup> Under these circumstances, basic African American self-respect required conceiving of oneself as a “rebel to this nation” and treating the Constitution as “a dirty rag, a cheat, a libel,” “to be spit upon by every negro in the land.”<sup>45</sup>

Turner was hardly alone among blacks during the late nineteenth century in calling for separation. As the old white oligarchy reclaimed its property and political authority across the former Confederacy, freed people particularly in the rural countryside saw themselves as exiles again in an oppressive land and often viewed the only solution to be emigration. Due to the prohibitive cost—not to mention white Southern efforts to constrain black movement and to maintain their labor supply—very few blacks actually succeeded in leaving the country.<sup>46</sup> But as African American activist and founder of the National Colored Colonization Council Henry Adams reported, by 1879, some 98,000 blacks had enrolled with the Council as potential emigrants.<sup>47</sup> Whether individuals ultimately escaped the South for Liberia, Haiti, Canada, or even states like Kansas (long associated with John Brown and radical abolitionism), the project of emigration constituted the largest black mass movement of the late nineteenth century. No doubt many middle-class and educated African Americans denounced the project as the worst brand of political defeatism. Those like Sampson, quoted above, saw it as a rejection of what African

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42. *Id.* at 310–11.

43. Henry McNeal Turner, *Communications*, CHRISTIAN RECORDER, Dec. 13, 1883.

44. *Id.*

45. *Id.*

46. See JOHN F. WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 137 (2007) (commenting that “only slightly more than 3,100 emigrated to Liberia in the ten years after the end of the war. Almost two-thirds of those emigrants left the United States in the first three years following Lee’s surrender at Appomattox”).

47. See CEDRIC J. ROBINSON, BLACK MOVEMENTS IN AMERICA 90 (1997).

Americans had fought and died for during the Civil War and as undermining the unity blacks needed in the present to achieve real formal equality under the Constitution. However, what allowed emigrationism to tap so deeply into poorer and rural constituencies were growing doubts that black freedom could ever be achieved under the Constitution, not to mention in a polity dominated by a white majority.

*B. Industrialization and Constitutional Opposition*

The second key force driving constitutional skepticism was the transformed economic landscape, which was marked by heightened bureaucracy, corporate concentration, and wild cycles of booms and busts. Such developments produced a highly inegalitarian society: by 1890, the top 1 percent held 51 percent of all property, and the bottom 88 percent of the population controlled just 14 percent of the wealth.<sup>48</sup> To make matters worse, the industrialization of the economy went hand in hand with the increasing control by corporate interests over political decision making. During what came to be called the “Gilded Age,” giant corporations wielded influence over politicians from both major parties at virtually every level of government, with railroad companies and industrial magnates enjoying particular access and privilege.<sup>49</sup>

By contrast, large numbers of the urban and rural poor found themselves subject to market volatilities and increasingly draconian labor practices, with little protection offered by political and legal officials. For many farmers, workers, and middle-class reformers, the constitutional system and especially the federal judiciary—the single institution most closely identified with the text—seemed to be a critical obstacle to addressing these problems of destitution and social inequality. In fact, in the closing years of the nineteenth century, Populists, Progressives, and labor activists ubiquitously denounced the bench.<sup>50</sup> Running in 1892 as the People’s Party candidate for president, James Weaver referred to John Marshall’s decision in *Marbury v. Madison* (1803) as a “gross usurpation” of power, which over time had allowed judges to operate as an “*imperium in imperio*.”<sup>51</sup> Not to be outdone, Populist Governor of Oregon Sylvester Pennoyer, in another article condemning *Marbury*, went so far as to conclude that, “This unconstitutional usurpation of the law-making power by

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48. See WALTER LICHT, *INDUSTRIALIZING AMERICA: THE NINETEENTH CENTURY* 183 (1995).

49. See generally JACK BEATTY, *AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA, 1865–1900* (2007); ALAN TRACHTENBERG, *THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE* (2007).

50. For a comprehensive catalogue especially of popular antipathy to the bench during this period, see WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937* (1994).

51. JAMES B. WEAVER, *A CALL TO ACTION: AN INTERPRETATION OF THE GREAT UPRISING, ITS SOURCE AND CAUSES* 74–75 (Des Moines, Iowa Printing Co. 1892).

the Federal courts is productive alone of confusion, anarchy and judicial despotism.”<sup>52</sup> Such claims were also commonplace in the labor movement. Samuel Gompers, founder of the American Federation of Labor (AFL) and representative of the more conservative “prudential unionist”<sup>53</sup> stance, viewed the Supreme Court as little more than a class instrument and judicial review as fundamentally illegitimate. In his words, “in exercising this prerogative the Supreme Court usurped power that did not constitutionally belong to it.”<sup>54</sup>

Although the argument about “usurpation” separated an ideal text from a corrupt practice, the close association between the Supreme Court and the Constitution increasingly generated direct attacks on the whole system. Weaver may have believed that judicial review contradicted the Framers’ intentions, but he nonetheless admitted that judicial power was consistent with the generally undemocratic structure of the constitutional process. Noting that only the House of Representatives was directly elected by popular vote in the 1890s, Weaver wrote that “the fact remains beyond dispute that under our present system, three out of the four subdivisions of Government are practically placed beyond the control of the multitude.”<sup>55</sup> For Walter Clark, the Populist Chief Justice of the North Carolina Supreme Court and one of the state’s most popular politicians during the era, this meant that although the Constitution’s Framers did not intend judicial review, it nonetheless conformed to the broader drift of the text. Judicial review had been allowed to flourish because the system as a whole was “never democratic.”<sup>56</sup> Calling for a new constitutional convention, Clark viewed the Electoral College, the indirect election of Senators, and the lifetime appointment of federal judges as antiquated holdovers from a feudal and monarchical age. These veto points not only undermined the ability of citizens to respond effectively to dramatic economic changes, they also were “anachronism[s] . . . a survival from times when the people’s representatives could not legislate without the assent of the monarch expressly given to each act.”<sup>57</sup>

The fact that even sitting judges adopted such views demonstrated that arguments regarding an undemocratic Constitution reached far beyond agrarian rabble-rousers or labor protestors. They formed part of a broad public discourse in which countless muckraking exposés and historical works highlighted the

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52. Sylvester Pennoyer, *The Case of Marbury v. Madison*, 30 AM. L. REV. 188, 202 (1896).

53. Among labor historians, the term refers to union activists who opposed endorsing political parties, emphasized trade over larger class-conscious identities, and believed that unions should focus on immediate economic interests rather than broader social change. See generally BRUCE LAURIE, *ARTISANS INTO WORKERS: LABOR IN NINETEENTH-CENTURY AMERICA* 176–210 (1989).

54. Letter from Samuel Gompers, President, Am. Fed’n of Labor, to Charles Warren (Apr. 18, 1924) (unpublished material on file with the Library of Congress, Manuscripts Division, Charles Warren Papers).

55. WEAVER, *supra* note 51, at 73.

56. Walter Clark, *The Revision of the Constitution of the United States*, 32 AM. L. REV. 1, 5 (1898).

57. *Id.* at 7.



democratic weaknesses of the constitutional system.<sup>58</sup> Similar to Clark's views above, these exposés tended to explain the era's constitutional failures by revisiting the text's framing and ratification. According to such writings, the Constitution was structurally incapable of addressing mass economic grievances, because it had been constructed to serve propertied interests and to thwart popular will. These books effectively espoused views similar to those of some Southern white supremacists, albeit to very different ends. In particular, Beard's 1913 work *An Economic Interpretation of the Constitution of the United States* depicted the Constitution as a counterrevolutionary document pressed on poor farmer-debtors by wealthy bondholders, and it became the period's "generally accepted view of the founding."<sup>59</sup> According to Vernon Louis Parrington, summarizing the turn of the century and Progressive era literature in 1930, the Constitution was nothing more than "a deliberate and well-considered protective measure designed by able men who represented the aristocracy and wealth of America; a class instrument directed against the democracy."<sup>60</sup>

Even anti-Populist and more establishment public intellectuals repeated this sentiment. William Allen White, famed newspaper editor and author of the 1896 editorial "What's the Matter with Kansas?," described the Constitution in terms that echoed the most radical agrarian or labor activist:

[I]t seems necessary to inquire if this capture of the Constitution by our only aristocracy—that of capital—was not in truth merely a recapture of what was intended in the beginning by the fathers to belong to the minority. The checks and balances put in that Constitution to guard against the rule of the majority protected slavery for fifty years, and perhaps they bound the nation to the rule of the privileged classes in the nineties. Perhaps these same checks and balances were put into the Constitution deliberately—the judiciary which vetoes statutes and remakes laws, the rigidity of the fundamental law to amendment, the remoteness of the senators from popular election and control.<sup>61</sup>

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58. A quick list of some of the better-known titles gives a flavor of the argument: SYDNEY GEORGE FISHER, *THE TRUE HISTORY OF THE AMERICAN REVOLUTION* (1902); J. ALLEN SMITH, *THE SPIRIT OF AMERICAN GOVERNMENT* (1907); J. ALLEN SMITH, *THE GROWTH AND DECADENCE OF CONSTITUTIONAL GOVERNMENT* (1930); ALLAN L. BENSON, *THE USURPED POWER OF THE COURTS* (1911); ALLAN L. BENSON, *OUR DISHONEST CONSTITUTION* (1914); GUSTAVUS MYERS, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* (1912); GILBERT E. ROE, *OUR JUDICIAL OLIGARCHY* (1912); CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913); and LOUIS B. BOUDIN, *GOVERNMENT BY JUDICIARY* (1932).

59. See Forrest McDonald, *A New Introduction*, in *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* vii, xxi (1986).

60. Vernon Louis Parrington, *Introduction*, in J. ALLEN SMITH, *THE GROWTH AND DECADENCE OF CONSTITUTIONAL GOVERNMENT* ix, xiv (1930).

61. WILLIAM ALLEN WHITE, *THE OLD ORDER CHANGETH: A VIEW OF AMERICAN DEMOCRACY* 22 (1910). For more on muckraking and the Constitution, see J.S. Maloy, *The Muck of Politics and the Rake of Realism* (Nov. 2012) (unpublished manuscript) (on file with author).

Similarly, Herbert Croly, the Progressive co-founder of the *New Republic* and a key intellectual figure behind Theodore Roosevelt's 1912 presidential campaign, accepted that the Constitution was undemocratic in original design and ill suited for contemporary needs.<sup>62</sup> Most telling, Croly concluded that the greatest inhibition to change was not the judiciary or a specific institutional structure, but any lingering loyalty Americans still had for the text as it was. In his view, such loyalty had to be fundamentally repudiated, because by "consecrat[ing] one particular machinery of possible righteous expression," constitutional veneration transformed "reverence for order" into a destructive "reverence for an established order."<sup>63</sup>

Croly championed the need for a "New Nationalism," a term Roosevelt adopted in 1912 and credited to him, and presented constitutional loyalty as *compromising* rather than promoting shared national identity and purpose. Thus, the 1912 campaign saw the top two vote-getters in the presidential election either explicitly defending alternative constitutional models or closely aligning with voices deeply skeptical of the text. If anything, Wilson's ultimate election to the presidency—despite having authored multiple books suggesting the incompatibility between national strength and the existing constitutional structure—speaks to a very different politics of national identity and patriotism at the time. To make the point more sharply, Wilson strongly considered nominating constitutional opponent and fellow Southerner Walter Clark for the Supreme Court.<sup>64</sup> Thus, not only could a president question the text, but a potential Supreme Court justice could even argue for its outright rejection.

As the twentieth century began, discontent with the Constitution came from a remarkably diverse array of social groups, running the gamut from labor and agrarian activists to newly freed African Americans, middle-class reformers, public intellectuals, and Southern white supremacists. Although each group may have been disaffected for competing reasons, such widespread concerns raised real questions about whether the document could cohere a polity wracked by class, racial, and regional divisions. Ultimately, it would take a new war for the Constitution's defenders to begin to reshape this public debate. As the following Sections explore, for various government and civic leaders, the Constitution became a rallying cry to justify both American involvement in World War I and the Red Scare that followed it. Against the backdrop of external intervention and internal labor conflict, such figures

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62. See HERBERT CROLY, *PROGRESSIVE DEMOCRACY* 29–45 (1914). In the chapter, "The People and the Law," Croly referred to the Constitution as "inaccessible" to popular power: "[I]n practice the people have never had much to say about it." *Id.* at 43. Like White, he, too, argued that the amendment process needed to be revised, so that the Constitution could be changed "at the demand and according to the dictates of a preponderant prevailing public opinion." *Id.* at 231. Otherwise, "the political destinies of the American people will have to rest to an unnecessary and unwholesome extent upon the dicta of a board of judicial trustees." *Id.*

63. *Id.* at 45.

64. See ROSS, *supra* note 50, at 91.

argued that constitutional loyalty was a central precondition of patriotic citizenship and called on an expanded national security infrastructure to ensure widespread public commitment to the text and its basic values.

## II.

### WORLD WAR I AND THE MODERN ORIGINS OF CONSTITUTIONAL VENERATION

In April 1917, the same month as the United States' entry into World War I, a recently formed group, the National Association for Constitutional Government (NACG) published the first issue of *Constitutional Review*. In the issue, the group included a manifesto of principles explaining the reasons for its creation. According to the editorial, whatever may have been the appropriateness of criticizing the Constitution in the years before the war, that appropriateness had now disappeared. Faced with profound threats, citizens needed to recognize the real differences between the United States and its foreign enemies, which ranged from the German Empire to revolutionary socialists and anarchists. For those in the NACG, the Constitution, more than anything else in U.S. history, safeguarded the nation's essential institutions and separated a free American republic from monarchical tyranny or, even worse, "the chaotic rule of an irresponsible and absolutistic democracy."<sup>65</sup> However, as the editorial continued, at a moment when these "institutions [were] gravely menaced,"<sup>66</sup> "several millions of Americans" seemed indifferent to the Constitution's fate or even "advocate[d] what the Association deprecate[d]."<sup>67</sup> In the words of the NACG, "[t]he Constitution [was] in danger of assassination in the house of its friends."<sup>68</sup> The only solution was a concerted effort by "all right-minded men" to revive "the real patriotism of the great mass of the American people" and to defend both the Constitution and the government it had established from assault.<sup>69</sup>

The NACG was only one of a plethora of political associations that gained prominence in the context of the war and intertwined loyalty to the text with aggressive national security politics. In this Part, I examine the deep interconnections between calls for a more robust security infrastructure and those for a public culture of constitutional respect during the 1910s and 1920s. I highlight the overlapping membership of pro-Constitution and pro-war activism, as well as how constitutional discourses helped infuse security practices with a higher normative purpose. At the same time, I also show how the context of war reframed the perceived stakes of debates over the Constitution's legitimacy. In particular, concerns about external threats and internal social disorder led many Americans to see the Constitution, whatever

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65. *The National Association for Constitutional Government*, 1 CONST. REV. 35, 36 (1917).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

its flaws, as an unassailable foundation for shared national identity. Security rhetoric thus played a critical role in generating a new mass base for constitutional veneration.

*A. The Interconnection of Pro-Constitution and Pro-War Activism*

Although we often think of constitutional commitment as an important check on national security excesses, such commitment took root in modern American society precisely through wartime efforts to expand the national security framework. Constitutionalist at the time overwhelmingly advocated for both devotion to the document and heightened militarization of collective life. Indeed, most of the key figures behind war mobilization efforts were the very same ones pressing for greater popular constitutional reverence. The National Association for Constitutional Government provides just one telling example. Its founder and head, David Jayne Hill, was a former ambassador to Germany and president of the University of Rochester; he also served as an honorary vice president of the American Defense Society<sup>70</sup> and spoke routinely on behalf of the National Security League (NSL).<sup>71</sup> The Defense Society and the League were two of the most prominent military preparedness organizations. Early champions of a permanent civilian defense infrastructure, these groups advocated for the expansion of military funding, the creation of executive branch institutions overseen by military experts to coordinate defense policy, and compulsory peacetime military service and training for all able-bodied male citizens.<sup>72</sup>

Hill's movement between the NACG, the Defense Society, and the NSL was hardly novel, and indeed common membership and leadership were widespread across the various groups and across pro-Constitution and pro-security activists more generally. For example, Nicholas Murray Butler, President of Columbia University for the first four decades of the twentieth century, was both a frequent author for the NACG's *Constitutional Review* and an executive committee member of the National Security League.<sup>73</sup> James Beck, Solicitor General between 1921 and 1925 and author of countless books and articles praising the wisdom of the Constitution, was also heavily involved with the League. He participated in its "patriotic education" campaigns during

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70. *Calls for Strict Ban on German Language: American Defense Society Also Urges Vigorous Steps to Put an End to Plots*, N.Y. TIMES, Feb. 25, 1918, at 4 [hereinafter *Calls for Strict Ban on German Language*].

71. *See Assails Navy Plan as Far Too Slow: Security League's President Also Denounces It as Weak and Insufficient*, N.Y. TIMES, Jan. 21, 1916, at 5 [hereinafter *Assails Navy Plan*].

72. For more on the history of both groups, especially the larger and more influential National Security League, see Mark R. Shulman, *The Progressive Era Origins of the National Security Act*, 104 DICK. L. REV. 289 (2000); Robert D. Ward, *The Origins and Activities of the National Security League, 1914–1919*, 47 MISS. VALLEY HIST. REV. 51 (1960); and JOHN CARVER EDWARDS, *PATRIOTS IN PINSTRIPE: MEN OF THE NATIONAL SECURITY LEAGUE* (1982).

73. *See* EDWARDS, *supra* note 72, at 53.

the war, writing the preface to one of the group's speaker handbooks.<sup>74</sup> After the war, the NSL independently distributed his reflections on the Constitution, by, for example, sending out 10,000 free copies of his 1922 collected volume, *The Constitution of the United States*.<sup>75</sup> The League had a similar relationship with Charles Warren, Wilson's former Assistant Attorney General, editorial board member of *Constitutional Review*, and Pulitzer Prize-winning constitutional scholar.<sup>76</sup> Given this overlap of membership and ideological goals, it is hardly surprising that pro-Constitution and pro-security organizations often worked together on joint initiatives. Many even formed umbrella groups to coordinate their efforts, like the establishment in 1922 of the Sentinels of the Republic, which united the American Defense Society, the National Association for Constitutional Government, the Constitutional Liberty League, and the American Legion, a powerful veterans group formed in 1919.<sup>77</sup>

At an organizational level, a primary reason for this overlap had to do with their sources of funding and the energy behind drives for military preparedness and greater constitutional loyalty. For most of these civic associations, the primary financing came from the business community in New York City. For instance, the NSL's main donors included corporate tycoons such as George H. Putnam, Cornelius Vanderbilt, Henry C. Frick, and Simon Guggenheim.<sup>78</sup> This concentration of influence was hardly uncommon during the age. As historian Sven Beckert writes, at the turn of the century, the city's mercantile elite in particular "dominated the nation's trade, production, and finance" and enjoyed an outsized political power that "reverberated . . . from City Hall to the White House."<sup>79</sup> Underscoring the point, when Robert Lee Bullard, U.S. Army General during World War I and President of the NSL in the 1920s, retired from the military following the war, he relied not on the federal government but on private capital for his financial security. New York City businessmen, including Vanderbilt, raised \$20,000 as a lump sum

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74. See James M. Beck, *Preface*, in *AMERICA AT WAR: A HANDBOOK OF PATRIOTIC EDUCATION REFERENCES* iii, iv (Albert Bushnell Hart ed., 1918) (arguing that such books produced by the National Security League "render[] a special service . . . in again bringing to the attention of the American people the continuing importance of preparedness").

75. See KAMMEN, *supra* note 21, at 252.

76. Referring to one of Warren's pamphlets on the virtues of the Supreme Court, the executive secretary of the NSL wrote to him in 1924 that they had printed 15,000 copies and sent them "into practically every State in the Union." Letter from E.L. Harvey, Exec. Sec'y Nat'l Sec. League, to Charles Warren (Feb. 16, 1924) (on file with the Library of Congress, Manuscripts Division, Charles Warren Papers).

77. Michael Kammen writes that "its organizers hoped to persuade one million people 'to pledge themselves to guard the Constitution and wage war on socialism.' Their battle-cry became the following: 'Every citizen a sentinel, every home a sentry box.'" KAMMEN, *supra* note 21, at 225.

78. See Ward, *supra* note 72, at 52, 54.

79. See SVEN BECKERT, *THE MONIED METROPOLIS: NEW YORK CITY AND THE CONSOLIDATION OF THE AMERICAN BOURGEOISIE, 1850-1896*, at 4 (2001).

retirement fund and then facilitated his rise to presidency of the League.<sup>80</sup> In effect, the influence and goals of the New York City mercantile elite, who were primarily concerned with protecting private property and maintaining social order, helped cement the connection throughout the 1910s and 1920s between a strengthened national security state and efforts to popularize the Constitution.

*B. The Constitution as the Positive Principle for a New Security State*

Besides sharing business sponsorship, the profound symbiotic relationship between the two projects also revolved around their deeper ideological continuities. Critically, the linkage of the Constitution with national security enhanced the popular legitimacy of arguments both for an entrenched security infrastructure and for greater constitutional loyalty. To begin, the most common criticism leveled at advocates of military preparedness and American entry into World War I (as well as global power politics generally) was that American interventionism abroad and the creation of a permanent war footing at home were inconsistent with national principles. In particular, such policies went against two popular assumptions: 1) skepticism of a standing army and belief in transparent decision making through civilian control; and 2) wariness of entanglement with European rivalries.

Indeed, during the early republic, extensive hostility existed toward professional standing armies: Virginia Congressman John Randolph famously described them as “mercenaries” and “ragamuffins.”<sup>81</sup> Even a century later, the widespread view remained that standing armies only promoted the rise of military despotism. At the same time, a classic tenet of American foreign policy held that isolation from Europe and its internecine conflicts sustained domestic tranquility. In *Federalist No. 8*, Alexander Hamilton famously argued that the barrier of the Atlantic Ocean meant that as long as the republic did not fracture internally, its external position would be one of calm.<sup>82</sup> He concluded:

If we are wise enough to preserve the Union we may for ages enjoy an advantage similar to that of an insulated situation. Europe is at a great distance from us. Her colonies in our vicinity will be likely to continue too much disproportioned in strength to be able to give us any dangerous annoyance. Extensive military establishments cannot, in this position, be necessary to our security.<sup>83</sup>

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80. Robert Lee Bullard, Personal Diary (June 29, 1928) (unpublished list of benefactors) (on file with the Library of Congress, Manuscripts Division, Robert Lee Bullard Papers). In the note, Bullard lists the twenty men, all New York City residents, “who upon my retirement raised (among themselves) and gave me twenty thousand dollars.” *Id.*

81. LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 262 n.43 (1978).

82. See *THE FEDERALIST* No. 8 (Alexander Hamilton).

83. *Id.*

Such anti-interventionism and anti-militarism counseled against the push by pro-war activists toward both far greater global authority and its related domestic security requirements.

These longstanding views raised significant doubts about the American-ness of preparedness efforts, let alone the broader militarization of civilian life. In response, members of the Defense Society and the NSL developed a series of related arguments that bound national security vigilance and American interventionism with the protection and promotion of the Constitution. First and foremost, proponents of preparedness argued that the Constitution was ultimately what defined the national ethos. Thus, defending “Americanism” was nothing more than supporting the governmental system and public culture generated by the text. This constitutionally grounded vision of national identity had two effects: it placed the Constitution at the center of American exceptionalism and provided an implicit justification for greater militarism and global authority.

According to pro-war activists, the feature that most distinguished the American political project from Old World Europe was the Constitution. Whereas European communities were the product of feudalism as well as political and religious absolutism, the Constitution highlighted the extent to which the American experiment had been built from its founding on an effort to fulfill Enlightenment principles. As David Jayne Hill, founder of the NACG, wrote in his 1916 book, *Americanism: What It Is*, the Federal Constitution above all “developed here in America a new estimate of human values, and this had led to a new understanding of life.”<sup>84</sup> Contrasting European monarchical despotism with American commitments to liberty and self-government, declared that the “original and distinctive contribution of the American mind to political theory” was the focus on eliminating “forever the recurrence of absolutism in *every* form, whether official or popular, whether of dominant individuals or of popular majorities.”<sup>85</sup> The Constitution was the living embodiment of these goals and had produced a phenomenon unique in global history: it transformed a set of distinct North American colonies into a single, unified, and powerful nation bound to notions of universality and republican freedom. In effect, Hill and other World War I era defenders of the Constitution mapped out an early twentieth century variation of what scholar Nikhil Pal Singh and others have called “American universalism”<sup>86</sup>—namely the idea that what marks out the United States as exceptional is its status as the place where Enlightenment commitments truly took historical root.

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84. DAVID JAYNE HILL, *AMERICANISM: WHAT IT IS* viii (1916).

85. *Id.* at 27.

86. See NIKHIL PAL SINGH, *BLACK IS A COUNTRY: RACE AND THE UNFINISHED STRUGGLE FOR DEMOCRACY* 17–18 (2004) (“‘American universalism,’ historian John Higham summarizes, is ‘our egalitarian ideology . . . molded by the Enlightenment and forged in the revolution . . . simultaneously a civic credo, a social vision and a definition of nationhood.’”).

At stake in such claims was more than the belief that the Constitution safeguarded liberties at home. It also upheld the view that the Constitution spoke to a special mission abroad. According to Hill, European powers sought to divide the world according to a principle of “imperialism”<sup>87</sup> and thus treated other communities as little more than material spoils. Given these facts, a peaceful and stable international order required a strong American presence. The institutions and culture of American constitutionalism—premised on checks and balances, deep-rooted interpretative legal traditions, and respect for fundamental rights—were “antithetical to Imperialism, whose watchword is unlimited power”<sup>88</sup> and thus offered a necessary counterweight on the global stage. In opposition to European-style empires, the constitutional principle meant that American authority was centrally about creating the conditions in foreign, oftentimes non-European, societies for limited government and peaceful self-rule. Distinguishing U.S. colonial control over the Philippines following the Spanish-American War from European practices, Hill argued that American conduct on the island had been a step in the advancement of both civilization and international peace.<sup>89</sup> Glossing over the brutal American suppression of local independence efforts, he declared, “we have taken . . . a population in its political childhood and conscientiously striven to lay the foundations for its future self-government.”<sup>90</sup> Similarly, with the world increasingly consumed in global conflict, the United States had a responsibility to ensure that the institutions and culture of constitutionalism prevailed over those of imperialism in the international order.<sup>91</sup>

Furthermore, according to Hill and other pro-war activists, the United States had no choice but to enter the war and to claim a greater interventionist presence. Especially with the global repercussions of the Russian Revolution, European disorder had begun to reach American shores. This fact not only counseled for participation in the war effort abroad but also underscored the centrality of domestic security measures necessary to safeguard the constitutional order. As the NSL’s Executive Committee declared, American identity sprang “only from the protection of personal liberty and the right of property—the right of individual possession of property as guaranteed by the

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87. HILL, *supra* note 84, at 134.

88. *Id.*

89. For a more complete account of how the Spanish-American War and especially the occupation of the Philippines set the stage for emerging notions of constitutional meaning and national identity, see the extended discussion of the war and its aftermath in AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 262–90 (2010); *see also* Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. (forthcoming 2015).

90. HILL, *supra* note 84, at 177.

91. *Id.* at 223–24 (arguing that “[w]hen the American people have had time to realize the character and extent of the emergency our age is called upon to meet—and the moment for action has already arrived—their decision cannot be doubtful. The call to duty may require sacrifices, but we shall be a nobler people for making them”).



Constitution. He who does not believe in this cannot be an American.”<sup>92</sup> Arguing that Russian revolutionists of all stripes were massing in the United States to “overthrow . . . American institutions and ideals,”<sup>93</sup> the NSL maintained that preparedness and greater security vigilance were central to ensuring the basic survival of the Constitution. In essence, while such associations accepted public arguments that heightened militarism and global interventionism were historically novel, they contended that a new national security infrastructure had become critical to preserving a distinctively American way of life. The country not only had a global responsibility to protect constitutional values and institutions at home and abroad, but international events left it with no other alternative.

*C. Constitutional Devotion Finds a Popular Base*

Crucially, just as the discourse of American constitutionalism justified military preparedness and global interventionism, so too did security discourses help transform the popular mood around the Constitution. The war and fears of revolutionary extremism invigorated pro-Constitution groups and allowed the politics of constitutional loyalty to tap into a broad public base. As the foregoing comments by the NSL imply, in the decades before World War I, the Constitution had become most associated with corporate privilege. The public overwhelmingly viewed defenders of the Constitution as legal and business elites who were wary of any reform to property relations. Panegyrics on the Constitution came from familiar sources such as the American Bar Association (ABA), the National Civic Federation, chambers of commerce, and Rotary and Kiwanis clubs. Progressive journalist Norman Hapgood derisively referred to these champions of the Constitution as those “professional patriot[s]” committed to “defending the existing property and political system without change.”<sup>94</sup> Indeed, while significant voices among industrial workers, rural farmers, African Americans, Southern sectionalists, and the urban middle class all expressed critiques of the constitutional order and its legitimacy, only a comparatively narrow demographic wholeheartedly defended the text as it existed or asserted the Constitution’s fundamental importance to nationhood. But war and its aftermath generated a much broader audience willing to embrace a culture of constitutional reverence.

In large measure, the conflict in Europe highlighted for many white Americans, especially Protestants, the sense that the country they knew was coming apart at the seams, and that foreign danger required rallying around existing symbols of social order. In the half century leading up to World War I, virtually all the basic elements that had long defined American identity faced

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92. *Says We Face Revolution: National Security League Calls on Public to Awake*, N.Y. TIMES, Oct. 17, 1919, at 7.

93. *Id.*

94. See NORMAN HAPGOOD, PROFESSIONAL PATRIOTS 8 (1927).

extreme pressure. In particular, the United States had begun as a specifically Anglo settler project, combining explicit racial hierarchies and territorial conquest with republican commitments to internal equality and producerist ethics.<sup>95</sup> By the early twentieth century, however, the closing of the American frontier raised basic questions concerning land access and the republican promise of broad individual proprietorship.<sup>96</sup> At the same time, industrialization left growing numbers of white Protestants, long considered privileged insiders, subject to the vagaries of a wage economy.<sup>97</sup> Even worse, they found themselves competing over menial jobs with an influx of new and ethnically distinct immigrants from Southern and Eastern Europe, many of whom were Catholic.<sup>98</sup> Furthermore, while the end of Reconstruction ensured the preservation of white supremacy, it nonetheless left a history of black emancipation and formal legal equality that challenged the racial basis of the republic.<sup>99</sup>

With the social fabric seeming to unravel at home and the country facing war abroad, a significant number of white Americans reassessed their relationship to the Constitution. Whatever may have been its weaknesses, the text nonetheless connected them, in the twentieth century, to what they viewed as the golden age of the republic. Although the Constitution's principal backers had been mainly business elites, they were nonetheless able to strike a nerve with a growing public sentiment.<sup>100</sup> In effect, they conveyed the message that, as much as the country may have changed in terms of size, economic structure, or ethnic composition, what remained constant was the Constitution. In a time of war, this document—the country's lodestar—needed to be embraced as a sacred text.

Against this backdrop, the idea that so-called 100 percent Americanism<sup>101</sup> required fealty to the Constitution emerged for the first time as a defining mass political commitment. According to legal scholar Mark Shulman, despite its New York corporate sponsorship, “[b]y mid-1916[,] the NSL had some 50,000

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95. For a general account of American constitutional life as an experiment in “settler empire,” see RANA, *supra* note 89, at 8–14 (I argue that early colonists, along with their nineteenth century descendants, viewed society as grounded in an ideal of republican freedom that emphasized continuous popular mobilization and direct economic decision making, especially through land ownership, artisanal production, and homesteading. However, like other settler societies in Asia and Africa, many white Americans believed that this ideal required native dispossession and the coercive use of dependent groups, most prominently slaves, in order to ensure that they themselves had access to property and did not have to engage in menial but essential forms of work.).

96. *See id.* at 172–75.

97. *See id.* at 186–89.

98. *See id.* at 236–39.

99. *See generally id.* at 172–75, 194–205.

100. *See infra* text accompanying notes 110–13.

101. As historian Thomas Pegram explores, this term became common during the 1910s and 1920s to refer to the project of creating a culturally homogenous national identity built around Anglo-Protestant religious and political values. *See generally* THOMAS R. PEGRAM, ONE HUNDRED PERCENT AMERICAN: THE REBIRTH AND DECLINE OF THE KU KLUX KLAN IN THE 1920S (2011).

members nationally, organized into 155 branches in 42 states. By the end of the year, membership had doubled, with 250 chapters and 100,000 members.”<sup>102</sup> In large numbers, returning soldiers joined veterans groups like the American Legion, which took constitutional loyalty as a guiding principle along with the need to protect the Constitution absolutely from all perceived threats.<sup>103</sup> The Second Ku Klux Klan, born in 1915, had four million members by the mid-1920s and combined white Protestant supremacy with an extreme commitment to the Constitution. Underlining their belief in the tie between nation and text, during Klan initiation or “naturalization” ceremonies, new members were questioned about the seven sacred symbols of Klankraft and what they represented: one of these symbols was the flag, and it was meant to denote the Constitution.<sup>104</sup>

But even if World War I witnessed a profound shift in constitutional mood, defenders of the document still faced significant popular discontent with and even outright opposition to the constitutional system. Disillusionment had not disappeared; changes in public discourse simply meant that it now existed alongside an organized and mass politics of textual loyalty. As the following Part discusses, pro-Constitution groups responded to this reality of divided popular opinion by pursuing a series of strategies to produce widespread affective attachment to the text. In the process, they sought to form a new type of American citizen, one that psychologically identified with the constitutional state and was willing to defend it against external and internal foes, by force if necessary.

### III.

#### NATIONAL SECURITY AND THE FORGING OF A NEW CONSTITUTIONAL CITIZENSHIP

Especially in the context of war and the United States’ growing global presence, certain civic and governmental actors saw constitutional commitment as the ultimate national security objective. They held that political disagreements about social policy or how best to interpret the Constitution had to take place against a backdrop of shared popular support for the document, both as a governing institutional structure and as a national symbol. But defenders of the Constitution faced a significant problem: How do you foster a public culture of devotion to the text—and with it, devotion to a set of institutions associated with the federal government—against a backdrop of extensive disenchantment? During the early decades of the twentieth century, American constitutionalists ultimately responded to this problem by employing methods familiar to the history of modern state building, but hardly

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102. Shulman, *supra* note 72, at 305.

103. See PEGRAM, *supra* note 101, at 95–96.

104. See KATHLEEN M. BLEE, *WOMEN OF THE KLAN: RACISM AND GENDER IN THE 1920S*, at 38 (1991).

consistent with a liberal civic culture. Pro-war champions of the Constitution emphasized three related approaches: 1) utilizing educational campaigns to generate deference toward government institutions; 2) enforcing cultural assimilation and homogeneity; and 3) applying a new security apparatus to root out those individuals and groups deemed enemies of the Constitution. In the process, they spearheaded a far-reaching loyalty campaign unlike any in American history and, in doing so, fundamentally transformed popular assumptions both about the relationship between the Constitution and patriotism and about the legitimacy of coercive federal authority.

#### A. Patriotic Education and the Deferential Citizen

Even if constitutional veneration increasingly tapped into a mass base during World War I, civic associations and public officials still faced real constitutional distrust and a divided—rather than ideologically uniform—public. The first method that officials and activists employed to transform collective sentiment was a vigorous education campaign to “Populariz[e] the Federal Constitution.”<sup>105</sup> As the editors of *Constitutional Review* asserted, although dangerous revolutionary groups were “impervious alike to logic and to facts,”<sup>106</sup> most citizens would come to identify with the Constitution if properly taught about its essential features. Calling for “a campaign of counter-education,”<sup>107</sup> the *Review* stated that “the great mass of intelligent American citizens, who are in danger of being misled and corrupted by . . . insidious propaganda, should be thoroughly instructed in the fundamental principles of the American system of government and the contents and meaning of the great charter of their liberties.”<sup>108</sup> The core ambition of these efforts was to foster within citizens a sense of respect for government institutions and to groom the type of political subject who would be obedient to the existing legal structure and committed to the state’s security objectives. As the motto for one widely read pamphlet, *The United States Constitution Simplified*, declared: “Don’t Quarrel with Your Government; Read Your Constitution.”<sup>109</sup>

For today’s defenders of constitutional loyalty, like Tribe or Stone, such a brand of citizenship is the very opposite of what they associate with a public culture of constitutional commitment.<sup>110</sup> Tribe’s Constitution, understood as a “verb” or a “practice,” provides a shared public tradition of self-critique and progressive improvement.<sup>111</sup> Indeed, he and others imagine this tradition as fundamentally open ended and flexible, able to adapt to shifting social values,

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105. *Popularizing the Federal Constitution*, 4 CONST. REV. 235, 235 (1920).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* (quoting FRANK WESLEY PHELPS, *THE UNITED STATES CONSTITUTION SIMPLIFIED* (1920)).

110. See *supra* text accompanying notes 7–18.

111. See Tribe, *supra* note 9, at 18–19.

and, most importantly, able to provide a powerful language of dissent from prevailing but unjust laws. Thus, today's defenders may well dismiss these early constitutionalists as simply reducing the Constitution to a conservative and hawkish agenda and treating constitutional education as an opportunity for right-wing propaganda. As hinted above, pro-Constitution forces in the 1910s and 1920s were certainly more prominent on the political right. They also often subscribed to a formalistic theory of constitutional interpretation, one bound to the Framers' intent, respect for property rights, the defense of limited federal government, and skepticism of both "class legislation" and democratic excess.<sup>112</sup>

It should be noted, however, that constitutional education programs were not directly about interpretative disagreements between the right and left. Programs focused far less on which theory of constitutional meaning was most appropriate and far more on the essential justness, in broad terms, of the Constitution as a political and legal order. Indeed, this is why activities such as mass celebrations of the Constitution or school-mandated textual lessons were able to generate extensive support outside the political right. At the time, constitutionalists were responding to a more profound dilemma than the meaning of the words in the text. Given the fallout of the Civil War and the realities of industrial inequality, many turn-of-the-century Americans questioned whether the structure of the Constitution itself had failed. They doubted whether the institutions it established, such as the Senate, the Supreme Court, or the President, had proven adequate as processes for political decision making. Pro-Constitution activists saw disappointment with the Constitution as creating a real legitimacy problem for the federal government and consequently its security goals. They therefore aimed to silence first-order disagreements in society about whether to retain existing institutions at all. Educational campaigns were at root about creating and cementing the boundaries of dissent, thereby promoting universal loyalty to a background set of processes that would be placed beyond dispute. In other words, World War I era constitutionalists recognized the precariousness of the prevailing political system and sought to tame dissent and thereby make it safe.

In order to establish this deeper foundational agreement, such pro-Constitution groups developed a multi-pronged educational campaign aimed not at promoting rational and autonomous citizen-agents—in the mold of

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112. For more on how such constitutionalists in the early twentieth century helped to generate a tradition of modern American conservatism, with echoes today in everything from the Federalist Society to the Tea Party, see Johnathan O'Neill, *The First Conservatives: The Constitutional Challenge to Progressivism*, THE HERITAGE FOUNDATION (July 5, 2011), <http://www.heritage.org/research/reports/2011/06/the-first-conservatives-the-constitutional-challenge-to-progressivism>. For more on conservative constitutional interpretation in the nineteenth century, especially its formalist and originalist sensibilities, see Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 *STUD. IN AM. POL. DEV.* 191 (1997).

Tribe's or Stone's civic vision—but instead at instilling an unreflective and deferential identification with the constitutional state. The National Security League pressed for September 17 to be designated as a national holiday, “Constitution Day.” The goal was to use commemorative events to teach “the people in true Americanism and sound and intelligent patriotism” and, thus, to dispel the seductiveness of “bolshevism and the other alien cults which are attacking the foundations of our institutions.”<sup>113</sup> Although it would take eight decades for Congress to eventually establish the holiday, the NSL, working in concert with other like-minded groups, such as the Constitution Anniversary Association, generated widespread observance during the postwar period. The year 1919 saw governors of twenty states issue official proclamations declaring September 17 to be Constitution Day. Alfred Smith of New York announced, “I know that the citizens of this state will welcome the opportunity of demonstrating their love of country by participating in the nation-wide celebration of the signing of the Federal Constitution.”<sup>114</sup> That year, some twenty thousand meetings were held across the country in celebration of the text.<sup>115</sup> As *Constitutional Review* breathlessly told its readers, “If the average attendance was no more than five hundred persons, that would mean that, on that day, ten million[] of our people renewed their allegiance to the Constitution, were instructed as to its transcendent merits, and recorded their purpose to uphold its [sic] against all assaults.”<sup>116</sup> By 1923, observance had grown to such an extent that the American Bar Association and the National Education Association labeled the whole week “Constitution Week” and strongly encouraged schools to use part of each day for constitutional instruction. The War Department even ordered all military bases to engage in commemorative exercises.<sup>117</sup>

The educational campaign also included broad distribution of constitutional material, comprising countless pamphlets praising the document (such as those already mentioned by James Beck and Charles Warren<sup>118</sup>) as well as copies of the text itself. For example, the National Association for Constitutional Government published what it called a *Pocket Edition of the Constitution of the United States* and distributed 50,000 copies in 1920.<sup>119</sup> According to historian Kathleen Blee, the Women's Klan similarly produced “a detailed guide to the proper display of the American flag and a pocket-sized version of the U.S. Constitution,” each booklet emblazoned with the Women's Ku Klux Klan logo.<sup>120</sup> The National Security League even provided summer

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113. *Constitution Day, September Seventeenth*, 3 CONST. REV. 181, 181 (1919).

114. *The Observance of Constitution Day*, 4 CONST. REV. 46, 47 (1920).

115. *Id.* at 48.

116. *Id.*

117. See KAMMEN, *supra* note 21, at 222.

118. *Id.* at 252.

119. See JILL LEPORE, *THE STORY OF AMERICA: ESSAYS ON ORIGINS* 81 (2012).

120. BLEE, *supra* note 104, at 39.

correspondence courses on the Constitution for adults.<sup>121</sup> Also beginning in 1919, chambers of commerce, Rotary clubs, the ABA, and over a thousand newspapers worked together on the National Oratorical Contest in which private and public high school students gave speeches on the virtues of the Constitution.<sup>122</sup> According to the ABA's Committee on American Citizenship, by the mid-1920s "more than a million and a half young people" took part annually, in the process becoming "thoroughly educated in the Constitution."<sup>123</sup> Of the 1924 contest, scholar Michael Kammen writes that the "seven finalists spoke for twelve minutes . . . at the DAR [Daughters of the American Revolution] auditorium in Washington before an audience that included Calvin Coolidge and the president of the American Bar Association. Secretary of State Charles Evans Hughes and four associate justices of the Supreme Court served as judges."<sup>124</sup>

Perhaps the most central constitutional educational initiative focused on compelling all schools, from grade school to university, to impose constitutional instruction as a requirement of graduation. Combining forces with the ABA's Citizenship Committee, the American Political Science Association in the early 1920s put together a model statute for state adoption. Samuel Weaver of the Washington State Bar Association described the basic elements of the proposal:

- 1) Below the eighth grade the teaching of patriotism and citizenship;
- 2) beginning with the eighth grade, regular but elementary instruction in the principles of government;
- 3) no student to be admitted to a high school or a normal school without having met these requirements;
- 4) in all high schools, colleges, and universities regular courses of study of not less than three full periods per week throughout the school year;
- 5) no person to be granted a certificate to teach until he shall have passed a satisfactory examination upon the provisions and principles of our constitutional system. This law would require not only that the Constitution be taught in the schools, but that the students should be required to study it and to pass a satisfactory examination upon its principles.<sup>125</sup>

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121. See KAMMEN, *supra* note 21, at 235.

122. See *American Lawyers Support the Constitution*, 10 CONST. REV. 185, 186 (1926).

123. *Id.*

124. KAMMEN, *supra* note 21, at 233. To give a flavor of the speeches, that year's winning oration, after describing the Constitution as "the most finished, polished, and balanced relation between a people and their government that human mind has ever conceived," concluded by proclaiming that, "Our Constitution has brought into being a new sun. It is the sun of individual freedom, and as long as there are Americans, God willing, it shall never sink into the sea of forgotten destinies." Don Tyler, Address for the National Oratorical Contest (June 6, 1924), in *The National Oratorical Contest*, 8 CONST. REV. 245, 247, 248 (1924).

125. Samuel P. Weaver, Address Delivered Before the Washington State Bar Association (July, 22, 1926), in *The Constitution in Our Public Schools*, 11 CONST. REV. 105, 107 (1927).

These calls to action paid immediate dividends; historian Jill Lepore tells us that over the course of the 1920s, the number of states mandating constitutional instruction rose from twenty-three in 1923 to forty-three by 1931.<sup>126</sup>

Taken together, these educational initiatives, motivated by the need to establish the boundaries of acceptable disagreement and thus tame dissent, highlighted three aspects of deferential citizenship: ideological uniformity, constitutional duty or obligation, and reverence for the Founders. The vision for school instruction best captures the first aspect. For backers of the bills, which ranged from professional bodies and veterans groups like the American Legion and the Grand Army of the Republic to pro-Constitution organizations and even the KKK,<sup>127</sup> the goal was to ensure not just *any* mode of constitutional education but what Weaver called a “uniformity of instruction.”<sup>128</sup> According to civic associations, no law would be successful unless schools across the country employed the same nationalized teaching material. Only then could “universal loyalty” to the Constitution be “secured” “regardless of state lines.”<sup>129</sup>

To this end, the National Security League and other associations generated a plethora of manuals and booklets meant to ensure the right type of instruction.<sup>130</sup> Such classroom material was often framed as an exercise in ritual and memorization rather than an open-ended inquiry. For instance, one commonly used text, *Our Constitution in My Town and My Life*, written for teenagers by Etta Leighton (the Civic Secretary of the National Security League), consisted of over a hundred mechanical questions and answers:

84. What has our Supreme Court . . . been called? “The balance wheel of the Constitution. The high guardian of the Constitution itself.”

. . . .

91. What distinguishes our Government and makes it a safer guardian of the people’s rights than the governments of Great Britain or France? The Supreme Court, because it protects the people even from tyranny of the Government itself.<sup>131</sup>

Underscoring the connection between constitutional instruction and the creation of ideological consensus, Federal District Judge Martin Wade declared that anyone who questioned the viability of the Constitution should not be allowed to teach it: “I would not have in an American college a teacher or

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126. LEPORE, *supra* note 119, at 81.

127. See PEGRAM, *supra* note 101, at 96. In fact, according to historian Thomas Pegram, of the Indiana Klan’s state legislative agenda, what it called the “Americanization and Education” program, the only element that was actually enacted into law was a requirement for Indiana students to study the Constitution. *Id.* at 202.

128. Weaver, *supra* note 125, at 107.

129. *Id.*

130. See, e.g., ETTA V. LEIGHTON, *OUR CONSTITUTION IN MY TOWN AND MY LIFE: WITH 115 QUESTIONS AND ANSWERS* (1924).

131. *Id.* at 21–23.



professor who . . . even harbors a dream that some day this government will fail. . . . I would not tolerate a teacher . . . who . . . cannot find in discussing problems of American government more to glorify than to condemn.”<sup>132</sup> Similarly, according to one 1923 ABA report, “[t]he schools of America should no more consider graduating a student who lacks faith in our government than a school of theology should consider graduating a minister who lacks faith in God.”<sup>133</sup>

Alongside uniformity, constitutional education was also meant to create a particular theory of political membership. Constitutionalist found it important to develop within Americans a greater awareness of the duties and obligations of citizenship in order to enhance their devotional capacity and willingness to sacrifice personal ends for the nation. According to the same ABA report quoted above, “[t]he gravest danger is the gross indifference of our people to the duties of citizenship.”<sup>134</sup> Expanding on the point, Robert Lee Bullard, National Security League President, often gave a stump speech called “The Meaning of Citizenship.” In it, he argued that the Constitution established a system of government that could not last without the willingness of citizens to fight on its behalf—politically and militarily if necessary: “We hear all together too much about ‘rights’ . . . and too little about duty, obligation and responsibility. . . . The outstanding obligation is by force of arms to defend our government and maintain the Constitution of the United States.”<sup>135</sup>

This notion that citizens should feel a sense of duty to sacrifice on behalf of the Constitution highlights why constitutional champions, like Bullard, also defended universal and mandatory military training, even during peacetime. Indeed, support for such training was yet another point of contact between pro-Constitution and pro-security advocacy. As Henry Litchfield West, the Executive Secretary of the NSL and former Commissioner of the District of Columbia,<sup>136</sup> warned, “Citizenship means everything or nothing.”<sup>137</sup> That is, if Americans had neither the capacity nor the willingness to bear arms for the republic, citizenship itself was rendered an empty concept. Thus, for David Jayne Hill, constitutional instruction and armed instruction went hand in hand, because military training produced another key method for citizens to learn the importance of respect for the constitutional state. Arguing for the basic interconnection between the two forms of education, he told one audience, “[E]very able-bodied young man in our country should first be well instructed

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132. *Education and “The Faith of the Fathers,”* 5 CONST. REV. 181, 182–83 (1921).

133. *American Bar Association to Promote American Ideals*, 7 CONST. REV. 55, 58 (1923) [hereinafter *American Bar*].

134. *Id.* at 56.

135. Robert Lee Bullard, *The Meaning of Citizenship* 2–3 (undated) (unpublished speech) (on file with the Library of Congress, Manuscripts Division, Robert Lee Bullard Papers).

136. See Henry Litchfield West, *Universal Military Training*, 3 NAT’L SERV. 305, 305 (1918).

137. HENRY LITCHFIELD WEST, *UNIVERSAL MILITARY TRAINING: AS A PERMANENT PRINCIPLE OF NATIONAL DEFENSE* 3 (1918).

in the meaning and value of our free institutions, and taught a wholesome respect for civil authority, and then be impressed with the privilege and obligation of a full preparation of mind and body to defend them.”<sup>138</sup>

Finally, in addition to ideological uniformity and a sense of duty, constitutionalists saw their educational campaign as a means to elevate the status of the text’s Framers. To the extent that Americans embraced the genius of the Constitution’s Founders and saw them as uniquely skilled in political creation, citizens would be willing to identify emotionally with the document itself. Thus, the pamphlets, speeches, and teaching material generated during the period focused overwhelmingly on the virtue and wisdom of the Founders. For Leslie Shaw, former Governor of Iowa and Treasury Secretary under Teddy Roosevelt, “the Constitutional Fathers” were a “picked body of men . . . recognized as surpassing any equal number ever gathered for any purpose.”<sup>139</sup>

George Washington, in particular, enjoyed an exalted space in constitutionalist discourse; he was described time and again as the Framer most central to the decision to hold a convention and later to the text’s ratification. According to Charles Warren, “without [his] ardent advocacy . . . and the confidence inspired in the people by his support . . . the Constitution would never have been adopted.”<sup>140</sup> Similarly, for James Beck, it was Washington who convinced Americans that a new constitution was needed: “Turning his back upon the sweet retirement of Mount Vernon,” “[o]nce again the father of his people came to their rescue.”<sup>141</sup> For lawyers today, this focus on Washington may come as a surprise, because the present-day legal community most associates the text with James Madison or perhaps Alexander Hamilton<sup>142</sup>—and indeed both received their fair share of plaudits as well. But Warren, Beck, and other constitutional advocates, by emphasizing Washington, responded to a nagging criticism from constitutional skeptics—namely the idea that the revolutionary experience (complete with the Declaration of Independence) was fundamentally distinct from the more suspect constitutional founding a decade later. Washington’s status as both wartime commander-in-chief of the Continental Army and presiding “father” of the Convention allowed constitutionalists to refashion the text as the ultimate fulfillment of the revolutionary project. As such, it supported their efforts to confront directly the Populist and Progressive argument that the constitutional founding was a counterrevolutionary act. Glorifying Washington as a transcendent figure recast

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138. *Assails Navy Plan*, *supra* note 71.

139. Leslie M. Shaw, *A Republic, Not a Democracy*, 9 CONST. REV. 140, 141 (1925).

140. CHARLES WARREN, *THE TRUMPETERS OF THE CONSTITUTION* 20 (1927).

141. James M. Beck, *A Rising or a Setting Sun?*, 8 CONST. REV. 3, 5 (1924).

142. As just one example, see William Hogeland’s review essay of left-leaning books of progressive or “liberal originalism,” all of which emphasize the centrality of Madison and Hamilton, *Founding Fathers, Founding Villains: The New Liberal Originalism*, BOSTON REVIEW (Sept. 1, 2012), <http://www.bostonreview.net/us/founding-fathers-founding-villains-william-hogeland>.

the meaning of the Constitution and quelled suspicion of its revolutionary credentials.

Such glorification of all the Framers also served another equally central purpose. It responded to a public discourse shaped by intellectuals such as Charles Beard that, according to Warren, explained constitutional motivations in terms of petty rivalries and material interests and, in the process, demeaned the heroism of the nation's "fathers." During one of the many university lectures established to honor the text, the Cutler Lecture at Rochester University, Warren declared, "To describe the Constitution as simply the product of class interests or of propertied selfishness, is to assert that such motives as patriotism, pride in country, unselfish devotion to the public welfare, and belief in fundamental principles of right and government, did not exist or control."<sup>143</sup> These views besmirched true statesmen, and, even worse, made Americans in the twentieth century believe that they could do better. Reminding citizens of the gulf between the incorruptible Framers on the one hand and contemporary politicians and agitators on the other hand, he remarked, "They were great men, employed upon a great task, and moved by high impulses . . . . When you are asked, hereafter, to consider amendments to that instrument, it would be well to consider carefully whether the men who urge such changes are equally great and whether their motives and ideals are equally high."<sup>144</sup>

Taken as a whole, the educational campaign, with its focus on producing deference through ideological uniformity, duty, and reverence for the Founders, envisioned a particularly hierarchical relationship between the citizen and constitutional government. More than anything else, proponents of the text sought to transform the ordinary American's encounter with the document and its institutions. The Constitution was to be understood not as one historical path out of many, but rather as a sacred inheritance from mythic Founders—fundamentally outside the bounds of legitimate opposition and to be preserved at all costs.

Perhaps nothing better underscored these interrelated educational goals than the project to erect the new Supreme Court building. Completed in 1935, it represented pro-Constitution activism's greatest and most lasting aesthetic creation during the era, powerfully dramatizing the emerging vision of the ties binding citizens to their governing text. Cass Gilbert, a well-known architect with close links to the American Legion, the American Defense Society, and the National Security League, was tasked with designing the building. During the war, Gilbert had played a notable role in government propaganda as the Associate Chairman of the Committee on Public Information's Division of

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143. WARREN, *supra* note 140, at 65.

144. *Id.* at 69.

Pictorial Publicity.<sup>145</sup> Gilbert sought to make the building an imposing historic monument to the Constitution, one that would both inspire awe in citizens and melt away suspicion of the Court. For architectural critics at the time, however, “[t]he authority it meant to convey was easily confused with authoritarianism.”<sup>146</sup> This was because of how Gilbert imagined the individual citizen’s aesthetic experience on viewing and entering the building. He hoped to overwhelm the individual with the majesty of the Court, and in the process, instill an emotional willingness within the citizen to subsume his or her identity into a deep attachment toward both the Court and the constitutional state it embodied. At the time, Gilbert was deeply influenced by the revival of classical Roman iconography and design in 1920s Italy.<sup>147</sup> An admirer of Benito Mussolini, Gilbert chose an idealized and grand variation on ancient Roman architecture as the basis for the new building, sent Mussolini photographs of his Supreme Court drawings,<sup>148</sup> and even traveled to Italy to visit Mussolini and handpick the Italian marble.<sup>149</sup>

While clearly not all defenders of the Constitution during the period were sympathetic to Il Duce,<sup>150</sup> Gilbert’s design and intentions for the building were in line with the broader civic culture that such groups promoted. The building

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145. See Cass Gilbert, *Division of Pictorial Publicity*, in U.S. COMM. ON PUB. INFO., DIV. OF PICTORIAL PUBLICITY, VICTORY DINNER AND DANCE OF THE DIVISION OF PICTORIAL PUBLICITY (1919). His unpublished correspondences are filled with letters to and from these above organizations as well as influential pro-war constitutionalists like Nicholas Murray Butler and James Beck among others. See, e.g., Letter from Cass Gilbert to Nicholas Murray Butler, President, Columbia Univ. (Dec. 7, 1933) (on file with the Library of Congress, Manuscripts Division, Cass Gilbert Papers); Letter from Elon H. Hooker, Chairman, Am. Def. Soc’y, to Cass Gilbert (Feb. 16, 1931) (on file with the Library of Congress, Manuscripts Division, Cass Gilbert Papers); Letter from Cass Gilbert to Robert Lee Bullard, President, Nat’l Sec. League (Mar. 26, 1931) (on file with the Library of Congress, Manuscripts Division, Cass Gilbert Papers).

146. Paul Spencer Byard, *Representing American Justice: The United States Supreme Court*, in CASS GILBERT, LIFE AND WORK: ARCHITECT OF THE PUBLIC DOMAIN, 272, 285 (Barbara S. Christen & Steven Flanders eds., 2001).

147. After a personal audience with Mussolini, while in Italy to choose the stone for the Supreme Court, he gushed:

He is making Italy proud of itself. He is restoring her ancient glory. . . . He is not forgetting the army and navy, they are both ready, well equipped, up to date, well disciplined, well armed. They are forces to be reckoned with, especially now, since Italy is so well worth fighting for. Patriotism is taught to the children and to grown people alike, and when a whole people is convinced of the greatness of their country and the wisdom and greatness of their leader that country is to be respected.

Cass Gilbert, Mussolini 15 (June 6, 1933) (unpublished manuscript) (on file with the Library of Congress, Manuscripts Division, Cass Gilbert Papers); see also KAMMEN, *supra* note 21, at 268.

148. Letter from Cass Gilbert to Nobile Giacomo de Martino, Italian Ambassador to the U.S. (Oct. 11, 1932) (on file with the Library of Congress, Manuscripts Division, Cass Gilbert Papers).

149. Letter from J. Alfred Pisani to Giulio C. Pisani, Jr. (Apr. 26, 1933) (on file with the Library of Congress, Manuscripts Division, Cass Gilbert Papers). For more on Gilbert’s trip to Italy as part of the construction of the Supreme Court Building, see KAMMEN, *supra* note 21, at 266–69.

150. For an excellent introduction to the complicated reception of Mussolini and fascism in the United States during the 1920s, see JOHN P. DIGGINS, MUSSOLINI AND FASCISM: THE VIEW FROM AMERICA (1972).

spoke to a pro-Constitution sensibility that saw deference to institutions and to heroic leaders as foundational for constructing a constitutionally loyal citizen supportive of broader national security goals. Although today's discussions of constitutional commitment tend to link textual loyalty to self-examination instead of political compliance, such subservience nonetheless played an essential role at a moment when first-order disagreement about the document was a powerful force in public life. Under such conditions, constitutional education, through speeches, mass celebrations, textbooks, and even architectural monuments, tied the text to hierarchical forms of allegiance.

*B. American Exceptionalism and Cultural Particularity*

This politics of deference went hand in hand with an ethnicized discourse of collective identity, one that again asserted the importance of national security. Rather than avoiding the pitfalls of locating community in blood and land, pro-Constitution narratives of American exceptionalism played fundamentally on tropes about cultural particularity and fitness. On first glance, this might be surprising given how, as discussed previously, emerging accounts during the period regarding the specialness of the American Constitution invoked universalistic Enlightenment values. And indeed, important figures during and after World War I very consciously maintained that "Americanism" was not reducible to ethnic criteria. David Jayne Hill himself declared:

It cannot be maintained that Americanism . . . is a matter of race. Our country from the beginning has been populated by people of widely different ethnic origins. Some of their qualities are perpetuated with practically little effacement, others are obscured by the syncretism of races; but there is no definable ethnic type that is exclusively entitled to be called American.<sup>151</sup>

For many defenders of the Constitution at the time, the idea that collective identity was bound to affective attachment to a document—moreover, one that consisted of abstract republican principles—spoke to an inclusive brand of belonging. As Hill suggested, anyone—as long as he or she was willing to ascribe to these tenets—could become "American."<sup>152</sup>

However, ideas of cultural particularity steadily regained prominence as pro-war constitutionalists responded to yet another challenge emerging at the time: Why should one view the text as the best expression of a broader Enlightenment heritage that was not necessarily specific to the United States? Especially with growing numbers of new European immigrants, why not learn from these communities' alternative methods for adapting the republican values of self-government, rights protection, and economic independence to changed modern circumstances? Indeed, immigrant groups played a powerful

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151. HILL, *supra* note 84, at vii.

152. *Id.*

role during the era in revitalizing political activism<sup>153</sup> and speaking out against American involvement in World War I, especially within the labor movement and growing socialist parties.<sup>154</sup> As anti-war and pro-immigrant voices like Randolph Bourne argued, the United States had the opportunity to become “the first international nation.”<sup>155</sup> This meant incorporating new concepts from abroad and even fundamentally shifting existing institutions rather than simply holding firm to a “homogeneous Americanism,”<sup>156</sup> especially when such ideologies went hand in hand with militarism and coercive government practices.

In order for defenders of the Constitution to link textual loyalty to national security, and then to the war effort, they would first have to explain why the constitutional structure should remain immune from fundamental revision. Hill and others responded to this challenge by focusing again on American exceptionalism. The historical uniqueness of the American experience not only suggested that the Constitution was a sacred document and could not simply be replaced, but also that there was something culturally distinctive about the North American colonies that allowed such creedal values to flourish in the first place. The Framers were able to devise the Constitution because they had been raised in a political community culturally attuned to practices of self-rule and principles of liberty. According to Hill, the earliest colonists left monarchical England because of a “protest against mere power,”<sup>157</sup> and indeed the first truly American charter of liberty was not the Constitution but the Mayflower Compact of November 11, 1620. Long before England’s 1647 “Agreement of the People” or the later writings of Locke and Rousseau, initial settlers—“a company of plain men, sailing over wintry seas to an unknown land with the purpose of escaping the too heavy hand of an absolute government”<sup>158</sup>—forged “the beginning of real self-government.”<sup>159</sup>

Thus, the Constitution, a century and a half later, was just the culmination of a specifically American cultural commitment to the “voluntary renunciation of arbitrary power.”<sup>160</sup> This commitment, once more, highlighted why the United States enjoyed a special and redemptive global project, embodied by the war effort, and emphasized the domestic importance of preserving the country’s distinctive constitutional heritage. Such facts were a reminder to U.S. citizens to be wary of new, destructive concepts—threats to American security and identity—brought to the country by immigrants that did not have the same

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153. See DAVID A. SHANNON, *THE SOCIALIST PARTY OF AMERICA: A HISTORY* 43–62 (1955).

154. See STONE, *supra* note 14, at 138–40.

155. Randolph Bourne, *Transnational America*, in *THE RADICAL WILL: SELECTED WRITINGS 1911–1918*, at 248, 258 (Olaf Hansen ed., 1977).

156. *Id.* at 253.

157. HILL, *supra* note 84, at 13–14.

158. *Id.* at 14.

159. *Id.* at 15.

160. *Id.* at 29.

long-standing education in self-rule. As Burton Alva Konkle, a Swarthmore College history professor and frequent contributor to *Constitutional Review* in the 1920s, wrote of these recent arrivals, “instead of coming in a profound thoughtfulness for the blessings of free institutions, some place their raw Utopian theories on their banners and ask us to adopt them.”<sup>161</sup> In order for the Constitution to be sustained, Hill similarly concluded that immigrants would have to shed their old world and “un-American” “ideas and sentiments.”<sup>162</sup> A process of “Americanization”<sup>163</sup> was required to make sure that a culture of constitutional commitment spread successfully, “‘assimilating’ the new elements that enter into our population.”<sup>164</sup>

These voices saw the centerpiece of assimilation efforts as the stamping out of foreign languages in American educational and political life, with the expectation that an exclusive focus on English would help to standardize national identity and promote the capacities for self-rule among new communities. Calls for English-only measures expanded dramatically during the war as national security enmity focused especially on the German language, associated with both the Kaiser and revolutionary socialism. Hill’s American Defense Society demanded that state and local governments eliminate the use of German in schools and fight to make “the German language . . . a dead language.”<sup>165</sup> At the same time, the NSL began a national campaign “with the object of destroying the German-language press,”<sup>166</sup> through mass popular rallies and pressure on advertisers and news dealers.<sup>167</sup>

When the war ended, English-only proposals grew beyond the focus on German identity. By 1923, the number of states that required English-only instruction stood at thirty-five, up from just nine at the end of the nineteenth century.<sup>168</sup> Capturing the “Americanization” sentiment in 1919, Albert Bushnell Hart, Harvard historian and NSL Education Director of the Committee on Patriotism through Education, remarked that “[a]ny adult immigrant who comes to this country and is found three years thereafter unable to use English for the ordinary communications of life should be repatriated.”<sup>169</sup> In his view, “[n]o public or private schools ought to be allowed

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161. Burton Alva Konkle, *Americanizing Americans*, 8 CONST. REV. 97, 97 (1924).

162. HILL, *supra* note 84, at viii.

163. *Id.*

164. *Id.*

165. *Calls for Strict Ban on German Language*, *supra* note 70.

166. *League Starts War on German Press: National Campaign Organized to Limit Papers to English Language*, N.Y. TIMES, June 3, 1918, at 5.

167. *Id.* According to its Committee on Foreign Language and Foreign Press: “The animosity, clannishness, and the propaganda of undemocratic ideas are sources of injury to the community and the substitution of other languages for our own clearly fosters them.” *Aim to Make America a Land of One Tongue*, N.Y. TIMES, July 22, 1918, at 7.

168. PEGRAM, *supra* note 101, at 96.

169. Shulman, *supra* note 72, at 319 (quoting Letter from Albert Bushnell Hart to Charles D. Orth (Oct. 11, 1919) (on file with Harvard University Library, Albert Bushnell Hart Papers)).

to educate in any racial language except English” and suffrage should be limited solely to “those who can read and write English, not merely a few stock phrases and sign their name, but can actually communicate with people in the ordinary daily life.”<sup>170</sup>

This slippage between the text’s universalism and the culturally particular nature of American greatness promoted a xenophobic politics that intertwined national security and constitutional loyalty. Figures like David Jayne Hill or Albert Bushnell Hart, who had been W.E.B. Du Bois’s professor at Harvard and served as trustee of Howard University,<sup>171</sup> may have believed in the theoretical fitness of all ethnic and racial groups for full American membership. But transforming this theoretical fitness into a reality entailed eliminating cultural multiplicity and employing government power to impose a standard “American” identity on all groups. It meant pursuing at home the same brand of “tutelage” for racial and ethnic communities in their “political childhood” as that employed abroad to quell insurrection in the Philippines and elsewhere.

Even more troubling, as threatened communities contested these policies, the Constitution’s defenders often fell back on explicitly racialized explanations for internal resistance and for why security requirements justified the exclusion in practice of some groups. Although Hill’s discussion of the Pilgrims left the point essentially implicit, Iowa Governor Shaw reminded Americans that the social environment that produced the Constitution was above all an Anglo-Protestant one. In his view the reason why “Americanization” projects, and indeed the Constitution itself, faced such opposition was that by the early twentieth century the Anglo-Protestant identity was disintegrating under the pressure of racial and ethnic heterogeneity. From African Americans to Roman Catholics, the United States found itself attempting to integrate increasingly diverse communities; “many of them,” Shaw argued, were “biologically unable to think in terms of Anglican [sic] liberty.”<sup>172</sup> For the editors of *The American Standard*, the Klan’s widely circulated journal,<sup>173</sup> the Constitution “put into written form the immortal principles of liberty, popular government, and equal justice, which were the fruitage of Anglo-Saxon character.”<sup>174</sup> In language that echoed Hill’s more secularized account, the constitutional text was a fundamentally Protestant document that fulfilled the ambitions of the earlier Mayflower Compact, and which “made us a Body Politic, in the name of God.”<sup>175</sup> For the editors, the

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170. *Id.*

171. *Id.* at 306.

172. Shaw, *supra* note 139, at 141.

173. Emphasizing the Klan’s commitment to the Constitution, the journal was itself named after George Washington’s words at the Federal Constitutional Convention: “Let us raise a standard to which the wise and the honest can repair; the event is in the hands of God.” These words appeared on the cover of every issue of the *Standard*. See *Constitution Day*, 2 AM. STANDARD 420, 420 (1925).

174. *Id.*

175. *God and the Constitution*, 2 AM. STANDARD 420, 422 (1925).



country had to remain true to these racial and religious origins or it was liable to perish.<sup>176</sup>

In the end, the manner in which constitutionalists during the period moved between universalistic principles and culturally particular historical arguments highlights a significant danger with the connection between constitutional loyalty and national security. If anything, the link in the 1910s and 1920s between the Constitution and American exceptionalism meant that the document operated in collective life as a powerful rhetorical tool reimagining ethno-cultural homogeneity and control as national security requirements. Pro-war and pro-Constitution forces were able to combine seemingly conflicting political ideas about universalism and cultural superiority precisely through a constitutional reverence that promoted a discourse of American chosen-ness. This combination allowed civic and government actors to assert universalistic and inclusive commitments in theory, while in practice arguing that national security and basic order required the imposition of coercive policies grounded in ethnic and racial differences. Indeed, a seemingly paradoxical but lasting legacy of pro-Constitution activism in the period was the construction of a sophisticated language of racial domination that could draw on security concerns for validation while still speaking in universalistic terms.

### C. *Repression and the Constitution's Friends and Enemies*

Yet another deeply troubling feature of the debate over the Constitution involved the defenders' emphasis on government repression. Pro-Constitution forces often repeated that the vast majority of citizens and new immigrants were "well-meaning people"<sup>177</sup> who could be made patriotic through popular education about the text. At the same time, however, there existed a small group of enemies to the Constitution who could never be persuaded. According to one wartime National Security League pamphlet, these enemies were often "Secret Americans," individuals that might not have explicitly admitted their support for the German cause or for Russian revolutionaries but who quietly stood behind arguments about pacifism or the evils of militarism to undermine the constitutional system.<sup>178</sup> The pamphlet continues, "The only safe rule is to regard all of these as unconditional traitors."<sup>179</sup> As the pages of *Constitutional Review* maintained, such individuals underscored how "the enemy [was] within our gates,"<sup>180</sup> "covertly at work to undermine the Constitution."<sup>181</sup> Indeed, this internal threat, spearheaded by foreign agitators or revolutionary extremists,

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176. See *Constitution Day*, *supra* note 173, at 420.

177. *The Constitution Anniversary Association*, 7 CONST. REV. 191, 192 (1923).

178. See generally ALFRED M. BROOKS, CONVERTED AND SECRET AMERICANS (1918).

179. *Id.*

180. James A. Van Osdol, *Future Organization and Defense of the Constitution*, 13 CONST. REV. 121, 122 (1929).

181. *The Constitution Anniversary Association*, *supra* note 177, at 191.

had “made great headway”<sup>182</sup> and had “become[] a focus of infection for others.”<sup>183</sup>

As a result, education and Americanization efforts alone were not enough; groups also appealed directly to all friends of the Constitution to defend the political community by actively suppressing dissent. These groups argued not only for a dramatically expanded domestic security apparatus, but even for citizens to take matters into their own hands as part of a broader surveillance climate. The American Defense Society demanded “increased vigor in the interning of aggressive pro-German sympathizers, whether German citizens or not.”<sup>184</sup> Arguing for the country to follow the lead of England’s mass German internment, the Society noted that after the arrests, “malicious plots and propaganda ceased.”<sup>185</sup> It further called for the exclusion of the Socialist Party of America from politics—a position that met with some success as Wisconsin socialist Victor Berger was twice elected to Congress in 1918 and 1919 but denied his seat by the House.<sup>186</sup> Similarly, in 1920 the New York State Assembly suspended and then expelled on ideological grounds five socialists who had been elected to the body.<sup>187</sup> In fact, strong constitutionalists frequently claimed that the Wilson Administration, notorious during the period for its harsh crackdown on dissent,<sup>188</sup> was actually doing too little to stamp out internal threats. George Sutherland, former Utah Senator, future Supreme Court Justice, and himself a contributor to *Constitutional Review*, declared in 1918 that existing measures “did not go far enough.”<sup>189</sup> In his view, during wartime there was no place for “scurrilous and abusive criticisms of our form of government, our Constitution and our institutions” because “an unbridled tongue may be as dangerous as a wicked hand.”<sup>190</sup>

One famous voice of criticism came from within the Administration itself. Charles Warren, in many ways the most respected intellectual face of pro-Constitution activism in the 1920s and a well-connected figure in the Democratic Party,<sup>191</sup> played an especially aggressive role in debates within the

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182. *Id.*

183. *Teaching Constitutional Government*, 5 CONST. REV. 120, 123 (1921).

184. *Calls for Strict Ban on German Language*, *supra* note 70.

185. *Id.*

186. See SALLY M. MILLER, VICTOR BERGER AND THE PROMISE OF CONSTRUCTIVE SOCIALISM, 1910–1920, at 191–226 (1973).

187. See LOUIS WALDMAN, ALBANY: THE CRISIS IN GOVERNMENT 2–7 (1920).

188. See STONE, *supra* note 14, at 135–233.

189. GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 102 (1919).

190. *Id.*

191. Warren was close personal friends and a political advisor to fellow constitutionalist John W. Davis, U.S. Solicitor General, and conservative Democratic nominee for President in 1924. See, e.g., Western Union Telegram from John W. Davis to Charles Warren (Aug. 6, 1924) (on file with the Library of Congress, Manuscripts Division, Charles Warren Papers) (asking Warren to prepare a critical “survey” of the “Republican record” for use during the presidential campaign). His collected papers on file with the Library of Congress also include glowing correspondences from Louis

Justice Department. While Assistant Attorney General, Warren was the principal drafter of Wilson's two 1917 Proclamations regulating the conduct of "alien enemies," not to mention the Espionage Act (1917),<sup>192</sup> the Trading with the Enemy Act (1917),<sup>193</sup> and the Sedition Act (1918).<sup>194</sup> These laws provided the legal infrastructure for a massive and historically unparalleled federal assault on speech, dissent, and immigrant rights. Among other things, they led to the first government censorship boards,<sup>195</sup> the outlaw, according to historian Robert Goldstein, of "virtually all criticism of the war or the government,"<sup>196</sup> and the summary arrest of "alien enemies"<sup>197</sup> (alongside other measures to control enemy nationals such as their mass registration and a complete ban on their entering Washington, D.C.).<sup>198</sup> To give a sense of the coerciveness of national security practices during the war, some two thousand people were prosecuted under the Espionage and Sedition Acts, mostly for speech crimes (well-known politicians included socialists Eugene V. Debs<sup>199</sup> and Victor Berger<sup>200</sup>). Over six thousand "alien enemies" were detained under presidential warrants that the Attorney General issued, and the vast majority of them were interned in army detention camps.<sup>201</sup>

Warren saw the writing of these bills as his greatest achievement while in office.<sup>202</sup> But he was nonetheless angered by what he viewed as the weakness of the Justice Department in combating seditious speech. In particular, he believed that existing treason laws should be more "vigorously enforced,"<sup>203</sup> ensuring that all U.S. civilians who gave "aid or comfort"<sup>204</sup> to the enemy—through, for example, nonviolent political advocacy of anti-war positions—were fully prosecuted. As for noncitizen civilians, they should face court

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Brandeis and Franklin Delano Roosevelt to Oliver Wendell Holmes, Jr., Calvin Coolidge, Herbert Hoover, and countless others.

192. Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217.

193. Trading with the Enemy Act of 1917, Pub. L. No. 65-91, 40 Stat. 411.

194. Sedition Act of 1918, Pub. L. No. 65-150, 40 Stat. 553. On Warren's role as primary author, see Letter from Charles Warren to "Gard" (Apr. 22, 1918) (on file with the Library of Congress, Manuscripts Division, Charles Warren Papers).

195. See MILLER, *supra* note 186, at 193.

196. ROBERT JUSTIN GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA FROM 1870 TO 1976*, at 108 (1978).

197. *Id.*; see also Charles Warren, *Arrest and Internment of Alien Enemies* 535, 544 (undated) (unpublished "War Notes") (on file with the Library of Congress, Manuscripts Division, Charles Warren Papers).

198. See *id.* at 545.

199. See NICK SALVATORE, *EUGENE V. DEBS: CITIZEN AND SOCIALIST* 291–96 (2d ed. 2007).

200. See MILLER, *supra* note 186, at 206–13.

201. See Warren, *Arrest and Internment*, *supra* note 197, at 544.

202. See Letter from Charles Warren to "Gard," *supra* note 194, at 2 (as he told one friend, "It has been [an] arduous but exciting and eventful four years, and I feel I have given my very best efforts to the United States. I leave on the books at least four permanent records of my work. . . .").

203. *Id.*

204. See Charles Warren, *What is Giving Aid and Comfort to the Enemy?*, 27 YALE L.J. 331, 334 (1918).

martial for analogous crimes.<sup>205</sup> When these views met with some internal resistance and it became clear that the Justice Department was skeptical of mass treason trials, he reached out to extreme pro-war Senators like Lee Slater Overman from North Carolina and George Earle Chamberlain from Oregon. Warren drafted a new bill providing for the military trial of civilian citizens and noncitizens alike of all speech crimes,<sup>206</sup> with punishment by death at the discretion of military judges.<sup>207</sup> As Warren told Overman, in his view the lack of vigilance in the Justice Department had made clear that military involvement was the only solution: “[F]or nearly a year I have been convinced that the only effective way of dealing with enemy activities in this country was by the military . . . I do not believe that war can be effectively carried on by the criminal courts.”<sup>208</sup> After Chamberlain introduced the bill in the Senate, Thomas Gregory, the Attorney General, was furious at Warren’s insubordination and forced him to resign. Warren’s actions however made him a *cause célèbre* in Washington among national security hawks and helped to burnish further the patriotic credentials of pro-Constitution forces.<sup>209</sup>

Such activists did not stop with calls for new, more coercive security measures; they also pursued separate non-governmental actions against constitutional enemies. As one famous wartime manifesto, widely circulated by the National Security League, declared:

We ask that good Americans . . . uphold the hands of the Government at every point . . . Furthermore, we ask that where governmental action cannot be taken, they arouse an effective and indignant public opinion against the enemies of our country, whether these enemies masquerade as pacifists, or proclaim themselves the enemies of our Allies, or act through organizations such as the I.W.W. and the Socialist party machine, or appear nakedly as the champions of Germany.<sup>210</sup>

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205. See Letter from Charles Warren to “Gard,” *supra* note 194, at 2.

206. The proposed bill would have established military commissions for such speech crimes as “causing or attempting to cause insubordination or refusal of duty by any member” of the armed forces, “delivering or transmitting, or causing to be delivered or transmitted” to any member of the military “any written or printed matter which shall support or favor the cause of the enemy country or of its allies in the war, or which shall oppose the cause of the United States,” and “printing or publishing any such printed matter.” See S. 4364, 65th Cong. (1918).

207. See *id.*

208. Letter from Charles Warren to Lee Slater Overman (April 8, 1918) (on file with the Library of Congress, Manuscripts Division, Charles Warren Papers).

209. Warren received dozens of letters of support for his position. See, e.g., Letter from W.E.D. Stokes to Charles Warren (Apr. 20, 1918) (on file with the Library of Congress, Manuscripts Division, Charles Warren Papers) (stating, “Don’t, for Heaven’s Sake, resign. I have, for 6 months written to the President and told him that the War cannot be run by the Criminal Courts,—that we have got to try these cases by Court Martial; you know how I have worked over this question.”).

210. Theodore Roosevelt, *The Children of the Crucible*, in AMERICA AT WAR, *supra* note 74, at 314, 316. The ironic feature of this document is that it was written by intense pro-war advocate Teddy Roosevelt, who for many pro-Constitution activists in groups like the NSL and the American Defense Society still represented the prewar failure of Progressives to embrace fully the Constitution as it was.

This militant constitutionalism,<sup>211</sup> in which defenses of the text required popular campaigns of social censure, civic participation in government crackdowns, and if need be, independent political violence, became part of the public culture of the era. Bar associations routinely imposed “punitive professional sanctions”<sup>212</sup> like disbarment for those lawyers who defended or associated with dissidents; and constitutional loyalty meant “cleansing the bar,” as historian Jerold Auerbach notes.<sup>213</sup> At universities, professors who took anti-war stances or who were viewed as otherwise ideologically suspect found themselves without employment. At Columbia University, President Nicholas Murray Butler, an outspoken pro-Constitution voice, stated that there would be “no place” at the university for those who countenanced “treason” and oversaw the firing of numerous academics—eventually leading Charles Beard to resign in protest.<sup>214</sup>

Patriotic speaking tours, such as those of Robert McNutt McElroy, Princeton professor and NSL Educational Director, also embodied this militant spirit. As McElroy told the *New York Tribune* after a preparedness trip to Wisconsin, the whole state was effectively committing treason, given its large German population and “100,000 disloyal votes”<sup>215</sup> for socialist candidates. Stating the need for government investigations and, if necessary, action from loyal Americans, he declared, “I was out there when the news of the German advance was coming through, and from the reception it got you would scarcely have gained the impression that it was a blow to America. You would have been far more likely to suppose that it was somehow a cause for congratulation in this country.”<sup>216</sup> These cries of treason and calls for action stirred various groups to respond. The most notorious of them was the American Protective League, which, during the war, enjoyed a quasi-official status as it raided and surveilled suspected German sympathizers with the backing of state and federal

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211. I adapt the term *constitutional militancy* from 1930s German political scientist Karl Loewenstein’s phrase “militant democracy.” Particularly influential in post-World War II West Germany, he developed the idea of a “disciplined” democracy, which fought “fire . . . with fire” and justified German efforts to protect the state and its institutions at all costs. See Jan-Werner Müller, *On the Origins of Constitutional Patriotism*, 5 CONTEMP. POL. THEORY 278, 284 (2006) (quoting Karl Loewenstein, *Militant Democracy and Fundamental Rights*, II, 31 AM. POL. SCI. REV. 638, 656–57 (1937)). According to Jan-Werner Müller, in the postwar period, nationalists argued that a “free democratic basic order” would only persist if that state crushed both Nazi and Communist extremism. *Id.* at 285.

212. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 104 (1976).

213. *Id.* at 102.

214. ELLEN NORE, *CHARLES A. BEARD: AN INTELLECTUAL BIOGRAPHY* 80 (1983) (quoting Nicholas Murray Butler, President, Columbia University, Commencement Address (June 6, 1917)).

215. *West is Crowded with Pro-Germans, Dr. McElroy Says: Government Should Investigate University of Wisconsin, He Declares*, N.Y. TRIBUNE, Apr. 17, 1918, in JOHN BRADLEY WINSLOW ET. AL., *REPORT UPON THE STATEMENTS OF PROFESSOR ROBERT McNUTT McELROY AND THE EXECUTIVE COMMITTEE OF THE NATIONAL SECURITY LEAGUE RELATING TO THE UNIVERSITY OF WISCONSIN* 16, 18 (1919).

216. *Id.*

authorities. Similarly, the American Legion, again with government complicity,<sup>217</sup> initiated violent attacks on those it deemed constitutional enemies, including socialists and radical unions like the International Workers of the World (I.W.W.). As Progressive journalist Norman Hapgood reported at the time, by the end of 1920 the American Civil Liberties Union had verified over fifty coordinated acts of violence nationwide by Legionnaires.<sup>218</sup>

In effect, pro-Constitution advocacy became closely intertwined with a remarkably authoritarian statecraft. Precisely because constitutional enemies could not be educated or reasoned with, government officials and civic associations argued for legal and political responses that made use of the emerging national security infrastructure. Defending everything from bans on political parties to speech restrictions, arrests, and deportations, such voices maintained that anti-Constitution sentiment had to be eliminated once and for all. Again, most tellingly, this militancy was justified precisely in terms of the Constitution; security vigilance ensured the survival of the constitutional state and with it a liberal republican political order. Thus, organized groups defended constitutional reverence on national security grounds, and saw the exercise of repressive power as a method of fostering popular identification with the text.

Ultimately, this period of militant constitutionalism had profound and reverberating effects on American public culture. In particular, the concerted civic and government campaign succeeded in placing anti-constitutional sentiment on the permanent defensive. In the years that followed the war, an accusation of constitutional opposition was often tantamount to a charge of disloyalty. This did not mean that constitutional skepticism disappeared from the public realm. Indeed, it remained especially strong among Progressive-influenced intellectuals<sup>219</sup> as well as radical voices on the political left.<sup>220</sup> Both

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217. As one F.B.I. Special Agent explained government support for the organization, “[t]he Legion as a body are watching during the day and night so that nothing may start and that no trouble may occur.” REGIN SCHMIDT, *RED SCARE: FBI AND THE ORIGINS OF ANTICOMMUNISM IN THE UNITED STATES, 1919–1943*, at 109 (2000) (quoting Report, M.J. Fraser, Special Agent (Mar. 4, 1920)).

218. See HAPGOOD, *supra* note 94, at 57.

219. In the years before the war, Charles Beard had played a central role in establishing the conventional academic wisdom that the Constitution was an anti-democratic document inconsistent with the spirit of the American Revolution. Decades later during the New Deal, his voice continued to be a powerful one, speaking to the persistent climate of scholarly skepticism toward the Constitution. See Charles A. Beard, *The Living Constitution*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 29, 29 (1936) (rejecting the view that the Constitution should be deified as “a ‘sheet anchor,’ a ‘lighthouse,’ an ‘ark of the covenant,’ a ‘beacon,’ and a ‘fundamental law,’” and arguing instead that it was simply a collection of good and bad legal and political practices. “These symbols are supposed to represent some reality, something tangible, a substance which all good and wise men can see and agree upon. Yet in truth they are mere poetic images that correspond to no reality at all, and the employment of them is sheer animism.”).

220. For the entire life of the Socialist Party as a meaningful electoral force in American politics (and therefore well into the 1930s), its national platform and main politicians called for fundamental revisions of the Constitution to create a governing order that curbed judicial power and

groups, against the backdrop of the Great Depression and judicial opposition to the New Deal, expressed with renewed vigor longstanding structural concerns about the anti-democratic characteristics of the Constitution. But such views did not resonate as broadly, even prior to judicial acceptance of the New Deal, as they had twenty years ago. In the interim, public perceptions had begun to shift as to the relationship between Americanism, constitutional devotion, and national loyalty. For example, by the 1930s, even the Communist Party hoped to burnish its patriotic credentials by embracing a politics of constitutional reverence. During the 1936 elections, Earl Browder, Executive Secretary of the Communist Party, went out of his way to convince constituencies of the ideological continuities between communism and American constitutionalism. The key framer of the Party's 1936 platform, which famously stated "Communism is Twentieth-century Americanism,"<sup>221</sup> he stumped across the country carrying a copy of the Constitution in his pocket, a document meant to symbolize his "rights as a citizen."<sup>222</sup> Given the emerging mainstream public imagination, for a group concerned with being viewed as foreign or un-American, there was now no better way to prove one's local authenticity than to engage in Constitution worship.

In many ways, Americans today live on the other side of a long historical process of constitutional elevation that began during World War I. The implications of such national security origins for our contemporary climate of constitutional commitment are hardly reassuring. They highlight how the modern genesis of widespread attachment to the document was shaped fundamentally by markedly illiberal wartime and postwar practices. Such practices leaned heavily on ideological deference, forced assimilation, militarism, and repression, and sought to reimagine an aggressive security infrastructure as essential to the protection of American values. Moreover, these practices not only helped to quell first-order disagreements about constitutional legitimacy. They also established many of the central arguments that have dominated more recent American political thinking about the interconnections between the Constitution, global responsibility, and domestic security. Thus, in the following conclusion, I suggest that the problem with these World War I origins is not simply that of a dark past that offers little to say about today's constitutional climate. Rather, the scripts developed nearly a century ago continue to intertwine constitutional attachment with the prerogatives of the national security state in ways that often go unnoticed,

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mirrored European parliamentarism. As just one example of these calls for basic reform and even a second convention, see the following article by Norman Thomas, six-time presidential candidate of the Socialist Party: *A Socialist Looks at the Constitution*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 92 (1936).

221. *Campaign of 1936: The Election Platform of the Communist Party*, 1 NATIONAL PARTY PLATFORMS: 1840-1972, at 356, 360 (Donald Bruce Johnson ed., 1978).

222. *Checks, Constitution Browder's Claim Against Vagrancy Charge*, CORNELL DAILY SUN, Oct. 20, 1936, at 5.

emphasizing the real difficulties of separating the liberal and illiberal dimensions of American constitutional culture.

CONCLUSION: THE TROUBLED LIBERALISM OF AMERICAN  
CONSTITUTIONAL LIFE

In this Article, I have challenged the prevailing conventional wisdom that American constitutionalism has operated over the long run to refashion political and civic life around liberal values of pluralism, self-reflection, and rights-protection—in particular by curbing coercive national security frameworks. Through a close examination of the mass politics of constitutional veneration during and after World War I, I highlighted instead how discourses of security and constitutional commitment actually developed together, critically reinforcing one another at a moment of shared genesis. Present-day constitutionalists, particularly within left-leaning legal academic circles, probably would be at pains to distinguish their own inclusive and civil libertarian goals—not to mention the current constitutional culture—from this earlier era of militant constitutionalism. But as I indicate, there is a profound symbiotic relationship between today's "good" liberal constitutionalists and the "bad" illiberal constitutionalists of the early twentieth century.

Laurence Tribe, Geoffrey Stone, and others may well see very little in common between the pro-security constitutional discourses of World War I and their own vision of the text as the focal point for a public culture of dissent and self-critique. Yet, in a deep sense, such scholars valorize a public culture that exists against a backdrop of remarkable political consensus around the legitimacy of the basic institutions of the federal government. Unlike a century ago, no relevant organized political constituencies today question the essential structure of the constitutional state—if we should have a presidential system, or two houses of Congress, or a Supreme Court, let alone whether there should be a broad civilian defense infrastructure housed in the executive branch operative during peacetime. By contrast, none of these elements were taken for granted in the lead up to American participation in World War I; organized citizens contested everything from the tri-partite division of federal power to the appropriateness of a standing army. This widespread first-order disagreement raised profound anxieties among central political and economic elites about whether the country was in fact unraveling under the strain of industrial conflict, heightened immigration, and Europe's increasingly destructive imperial rivalries. Through an organized campaign of constitutional veneration, such elites in effect buttressed an economic and political status quo in real peril.

Indeed, one might well argue that the relative openness of the prevailing constitutional discourse today is tied closely to the fact that these first-order questions of legitimacy have been settled. All politically relevant groups—from Tea Party activists on the right to Occupy Wall Street protestors on the left—



essentially assume the permanence of American legal and political structures. In essence, Tribe and Stone are now able to focus on the self-reflective nature of constitutional discourse, and its embedded spaces for dissent, precisely because the parameters of acceptable popular disagreement have already been established—the *meaning* and *extent* of dissent have been fundamentally tamed. This does not imply that current defenders of the Constitution are simply wrong when they highlight how the governing constitutional culture facilitates reform efforts or presses against the very worst excesses of government violence. It does, however, underscore that today's presumptively liberal constitutional politics resulted from the practical elimination—often through force—of more revolutionary alternatives. This fact alone makes it very difficult to keep the constitutional culture embraced by left-leaning academics uncontaminated by and distinct from its illiberal foundations.

Perhaps one way to underscore this point is by highlighting the role of World War I era practices in ushering in a fundamental shift in how the Constitution has been debated and conceived. In the late nineteenth century, the Constitution was primarily depicted as simply a governing framework—a decision-making process and legal infrastructure shaping the contours of legislative, judicial, and executive authority. In this way, it was akin to other good and bad governing frameworks across the globe. And for various constituencies (especially labor activists and middle class reformers), the structures that the Constitution established were increasingly inadequate to meet basic social ends.

Within this broader discussion about how the structures of the state should be organized, much of the World War I era campaign of constitutional veneration deemphasized the focus on the actual empirical functioning and effects of the existing institutions. Pro-Constitution voices sought to remove basic structural questions from active contestation by instead reorienting constitutional conversation around the document's role as an ethical symbol of an overarching national project, one committed to universal values and requiring global preeminence. In many ways, today's liberal defenders of constitutional veneration carry on this basic shift in emphasis. To the extent that they present the Constitution as a "practice" or a culture of self-reflection and critique instead of as a relatively fixed structural framework, the result is to obscure precisely the extent to which foundational questions of institutional design have been removed from the table.

Just as important, the national security origins of today's constitutional climate also speak to lasting—if under-acknowledged—ideological continuities between the liberal egalitarian and the repressive dimensions in the American constitutional experience. This is perhaps most apparent in the two ways that the exceptionalist rhetoric of our constitutional culture has been put to use in the years since World War I. For instance, during the Civil Rights era, such exceptionalism played a central ideological role in justifying policies of

desegregation and racial inclusion. But at the same time, it also intertwined those reform aims with a set of Cold War foreign policy objectives grounded in an expanded domestic security infrastructure.

One sees this linkage between reform aims and Cold War foreign policy quite clearly in sociologist Gunnar Myrdal's seminal 1944 study on race relations in the United States, *American Dilemma*, a formative text for mid-twentieth century political elites. There, Myrdal contended that the Constitution embodied what he called "the American creed"<sup>223</sup> and through the text "[t]his nation early laid down as the moral basis for its existence the principles of equality and liberty."<sup>224</sup> Myrdal's invocation of America's universalist national identity accepted the practical reality of injustice, particularly the sinfulness of slavery, but essentially viewed the United States as an incomplete liberal society. For Myrdal, although the United States had only partially achieved its ideals, "[t]he main trend in [American] history is the gradual realization of the American Creed."<sup>225</sup> In his view, the effort to end segregation in the South was ultimately about fulfilling civic goals embedded in the Constitution—a position that many white liberals and middle-class African Americans came to embrace in the 1950s and 1960s. In fact, Martin Luther King, Jr. famously invoked the abstract principles of the Constitution to describe the American project in terms of universal equality and the country in 1964 as "essentially a dream, a dream as yet unfulfilled."<sup>226</sup>

But, as powerful as this exceptionalist discourse was for liberalizing reform, it also leveraged such reform for clear national security ends. Myrdal, along with many Cold War political elites influenced by *American Dilemma*, contended that since the country was where the Enlightenment took historical root—as embodied by the Constitution—this meant that "America feels itself to be humanity in miniature."<sup>227</sup> The consequence was that just as, domestically, the United States was a nation open to all, internationally, American power stood "warmheartedly against oppression in all the world."<sup>228</sup> Given that the country's constitutional values expressed the global community's ideals, American interventionism—and the massive peacetime civilian defense framework that maintained it—necessarily involved a defense of liberal goals against illiberal threats. In this way, invocations of the United States' exceptional constitutional culture served, as scholar Nikhil Pal Singh

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223. See GUNNER MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY xlv (1944). Myrdal contended that "American civilization early acquired a flavor of enlightenment which has affected the ordinary American's whole personality" and generated a creedal commitment to "liberty, equality, justice, and fair opportunity for everybody." *Id.* at xlv, xlviii.

224. *Id.* at 1021.

225. *Id.*

226. See Martin Luther King, Jr., The American Dream, Commencement Address at Lincoln University (June 6, 1961), in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 208, 208 (James Melvin Washington ed., 1986).

227. MYRDAL, *supra* note 223, at 1021.

228. *Id.*

remarks, to “uph[o]ld the prerogatives of the American national security state,”<sup>229</sup> including domestic efforts to root out constitutional enemies during the Cold War.

One may well argue that the same leveraging of exceptionalist discourse and constitutional attachment for national security frameworks has been a staple of the post-September 11 “War on Terror.” In effect, political elites at key moments over the last century have repeatedly—and at times unwittingly—reproduced precisely the constitutional vision articulated by pro-security voices in the 1910s and 1920s, especially that of David Jayne Hill and Albert Bushnell Hart. Recall that, for Hill and Hart, American belonging was grounded in universal Enlightenment values, as defined by constitutional commitment alone rather than racial or ethnic criteria. But as a corollary, they maintained that such exceptionalism, symbolized by the Constitution, necessitated an aggressive security approach capable of projecting American power and of safeguarding the constitutional state from all perceived threats.

All of this indicates that the most salutary readings of the American constitutional culture’s contemporary role require an important caveat. It may be the case that over the course of the twentieth century the rise of constitutional commitment has made it less likely for government actors to engage in the same rights violations as those that marked earlier eras—as Stone, Pildes, and others would argue. For instance, today, the idea of mass racial internment such as occurred during World War II would be unthinkable in large part because of our constitutional culture. But at the same time, one can also read the post-World War I experience as that of a near continuous growth in the footprint of the security apparatus, punctuated by repeated failures in rights protection down to the present-day. Moreover, in a deep sense, both the expansion of the security state and the persistent breakdown in basic safeguards have been shaped by a public culture that ties aggressive interventionism abroad and security practices at home to the very protection and promotion of American values, with the Constitution at the core. In this way, the politics of constitutional veneration has operated on both sides of the ledger. It has helped to shape a political context that on the one hand curbs the most extreme violations, while on the other hand promotes a vision of American international police power that systematically justifies on security grounds rights infringement in the first place.

Thus, the lasting influence of World War I era constitutional discourse underscores both the strengths and significant pitfalls of the constitutional culture produced during that period. It highlights the ideological interconnections between those rights-inclusive elements of the constitutional culture that scholars valorize and the potentially repressive strains that they

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229. See Nikhil Pal Singh, *The Black Panthers and the “Undeveloped Country” of the Left*, in *THE BLACK PANTHER PARTY RECONSIDERED* 57, 73 (Charles Earl Jones ed., 1998).

deemphasize in public conversation. In particular, these ties bring home the fact that one cannot write off the repressive strains as simply aberrational features of an essentially liberal modern constitutional tradition. As this Article has explored, the Constitution—and especially the climate of veneration that surrounds it—has provided twentieth-century Americans with the ideological parameters for political debate. Although these parameters have no doubt established a basis for important and truly radical changes, they have also left the country with a much more troubled cultural inheritance than many scholars and citizens appreciate or desire. In the long run, reckoning with this inheritance will require an understanding of the tangled relationship in American constitutional discourse between liberalism and illiberalism, and of the coercive outcomes that have been facilitated by presumptively liberal and inclusive constitutional values.

